(21,828.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 602.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1909

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1 Pleas Before the Hon. Thomas C. Munger, Judge of the District Court of the United States for the District of Nebraska, Sitting in Said Court, in the Omaha Division of Said District, within the Eighth Judicial Circuit, at the September Term, 1907, Thereof.

Be it remembered, that on the 13th day of December, 1905, Petition was filed in the Clerk's office of District Court of the United States for the District of Nebraska, which said Petition is in words and figures following, to-wit:

In the District Court of the United States within and for the District of Nebraska.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Petition.

Now comes the United States of America, by Irving F. Baxter, United States Attorney for the District of Nebraska, and brings this action on behalf of the United States against the Chicago, Burlington & Quincy Railway Company, a corporation organized and doing business under the laws of the State of Iowa and having an office and place of business at Omaha, in the State of Nebraska; this action being brought upon the suggestion of the Attorney-General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

First.

For a first cause of action plaintiff alleges that during all the times hereinafter mentioned said defendant was, and now is, a common carrier engaged in interstate commerce by railroad among the several states of the United States, particularly the states of Illinois, Iowa and Nebraska.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893, (contained in 27 Statutes at Large, page 531) as amended by an Act approved April 1, 1896, (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903, (contained in 32 Statutes at Large, page 943), said defendant, on or about August 8, 1905, hauled on its lines of railroad one car, to-wit, K. C. F. S. & M., coal car No. 13567, used in moving interstate traffic,
2 to-wit, coal, consigned from a point without the State of Nebraska, to Omaha in said State, which said car was not a four-wheel car nor an eight-wheel standard logging car.

Plaintiff further alleges that on or about said date, defendant

hauled said car with said interstate traffic over its lines of railroad in the City of Omaha, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the chain connecting the lock-pin or lock-block to the uncoupling lever being broken on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section two of the Safety Appliance Act, as amended by Section one, of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of said Act of Congress, as amended, defendant is liable to plaintiff in the sum of One Hundred ($100) Dollars.

Second.

For a second cause of action plaintiff alleges that during all the times hereinafter mentioned, said defendant was and now is, a common carrier engaged in interstate commerce by railroad among the several States of the United States, particularly the States of Illinois, Iowa and Nebraska.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893, (contained in 27 Statutes at Large, page 531) as amended by an Act approved April 1, 1896, (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903, (contained in 32 Statutes at Large, page 943), said defendant, on or about August 9, 1905, hauled on its lines of railroad one car, to-wit, C. B. & Q. coal car No. 80263, used in moving interstate traffic, to-wit, coal, consigned from Tyrone, in the State of Iowa, to Omaha, in the State of Nebraska, which said car was not a four-wheel car nor an eight-wheel standard logging car.

Plaintiff further alleges that on or about said date, defendant hauled said car with said interstate traffic, over its line of railroad in the City of Omaha, in the State of Nebraska, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the chain connecting the lock-pin or lock-block to the uncoupling lever being disconnected on said end of said car, thus necessitating a man or men going between the ends
3 of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of said Act of Congress, as amended, defendant is liable to plaintiff in the sum of One Hundred ($100) Dollars.

Third.

For a third cause of action, plaintiff alleges that during all the times hereinafter mentioned, said defendant was, and now is, a common carrier engaged in interstate commerce by railroad among the several states of the United States, particularly the States of Illinois, Iowa and Nebraska.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893, (contained in 27 Statutes at Large, page 531) as amended by an Act approved April 1, 1896, (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903, (contained in 32 Statutes at Large, page 943), said defendant, on or about August 9, 1905, hauled on its line of railroad one car, to-wit, C. B. & Q. coal No. 86192, used in moving interstate traffic, to-wit, coal, consigned from Tyrone, in the State of Iowa, to Omaha, in the State of Nebraska, which said car was not a four-wheel nor an eight-wheel standard logging car.

Plaintiff further alleges that on or about said date, defendant hauled said car, with said interstate traffic, over its line of railroad in the City of Omaha, in the State of Nebraska, when the grab-iron or hand-hold was missing from the right hand side of the "B" end of said car and when said car was not provided with secure grab-iron or hand-holds on the "B" end thereof, for greater security to men in coupling and uncoupling cars, as required by Section 4 of said Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred ($100) dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of Three Hundred ($300) Dollars, and its costs herein expended.

IRVING F. BAXTER,
United States Attorney.

4 STATE OF NEBRASKA,
Douglas County, ss:

Irving F. Baxter, being first duly sworn on his oath deposes and says that he is the United States Attorney for the District of Nebraska; that he is attorney for the plaintiff in the above entitled cause, and makes this verification for plaintiff; that he has read the foregoing petition, knows the contents thereof, and that the facts therein stated are true, as he verily believes.

IRVING F. BAXTER.

Subscribed in my presence and sworn to before me this 12 day of Dec. 1905.

[SEAL.] DAVID W. DICKINSON.
Notary Public.

Endorsed: Filed Dec. 13, 1905. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 4th day of January, 1907, an Answer was filed in said case, which said Answer is in words and figures following, to-wit:

District Court of the United States, District of Nebraska.

No. 31. Doc. O.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Answer.

I. Defendant for answer to the petition herein, admits that it is, and was at the times mentioned in said petition, a common carrier engaged in interstate commerce by railroad among the several states of the United States, particularly the states of Iowa and Nebraska.

II. Denies each and every other allegation contained in said petition.

Wherefore defendant prays to be hence dismissed with its costs.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.
By CHARLES J. GREENE.
Attorney for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss:

Charles J. Greene, being first duly sworn, says he is attorney for the above named defendant, which is a corporation, that he is authorized to verify the foregoing answer; that he has read the allegations thereof and believes the same to be true.

CHARLES J. GREENE.

5 Subscribed in my presence and sworn to before me this 4th day of January, 1907.

[SEAL.] M. F. CRITTENDEN,
Notary Public.

Endorsed: Filed Jan. 4, 1907. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 18th day of March, 1907, Replication was filed in said case, which said Replication is in words and figures following, to-wit:

U. S. District Court, District of Nebraska.

In the District Court of the United States in and for the District of Nebraska. In Equity. Omaha Division.

No. 31. Doc. O.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RY. CO.

The Replication of the United States of America, Plaintiff, to the Answer of Defendant.

This replicant, saving and reserving to itself, all, and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer, of the defendant, for replication thereunto, says that it does and will aver, maintain and prove said bill to be true, certain, and *in*sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove, as this honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

CHARLES A. GOSS, *U. S. Attorney,*
Solicitor for Complainant.

Endorsed: Filed Mar. 18, 1907. R. C. Hoyt, Clerk.

Be it remembered, that on the 31st day of May, 1906, a Petition was filed in said Court in which the United States of America is plaintiff, and the Chicago, Burlington & Quincy Railway Company, is defendant. Case No. 88-O, which said Petition is in words and figures following to-wit:

In the District Court of the United States within and for the District of Nebraska.

THE UNITED STATES OF AMERICA, Plaintiff.
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

6 *Petition.*

Now comes the United States of America, by Charles A. Goss, United States Attorney for the District of Nebraska, and brings this

action on behalf of the United States against the Chicago, Burlington & Quincy Railway Company, a corporation organized and doing business under the laws of the State of Iowa, and having an office and place of business at Seneca, in the State of Nebraska, this action being brought upon suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon duly verified information furnished by said Commission and lodged with said United States Attorney.

For a cause of action, plaintiff alleges that during all the time mentioned herein, defendant was and still is a common carrier, engaged in interstate commerce by railroading among the several states of the United States, particularly the States of Iowa, South Dakota, Montana, Wyoming and Nebraska.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531) as amended by an Act approved April 1, 1896, (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on or about January 26, 1906, hauled on its line of railway one car, to-wit, N. P. No. 5764; said car was an empty car and was generally used in the movement of interstate traffic, but was neither a four-wheel car nor an eight-wheel standard logging car, nor was it part of a train composed of four-wheel cars or of eight-wheel standard logging cars.

Plaintiff further alleges that on or about said date defendant hauled said car over its line of railroad from Seneca in the State of Nebraska, and within the jurisdiction of this Court, in a northwesterly direction to Alliance, in said State, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and which said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the Act of Congress, as amended, defendant is liable to plaintiff in the sum of One hundred dollars.

7 Wherefore, plaintiff prays judgment against said defendant in the sum of One hundred dollars and its costs herein expended.

CHARLES A. GOSS,
United States Attorney.
A. W. LANE,
Assistant U. S. Att'y.

STATE OF NEBRASKA,
Douglas County, ss:

Charles A. Goss, being first duly sworn deposes and says that he is the United States Attorney in and for the District of Nebraska, and attorney for the plaintiff in the within cause; that he has read the foregoing petition, knows the contents thereof, and that the facts therein stated are true, as he verily believes.

CHARLES A. GOSS.

Subscribed in my presence and sworn to before me this 31st day of May, 1906.

[SEAL.] DAVID W. DICKINSON,
Notary Public.

Endorsed: Filed May 31, 1906. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 25th day of June, 1906, Answer was filed in said cause, which said Answer is in words and figures following, to-wit:

United States District Court, District of Nebraska.

Doc. O. No. 88.

THE UNITED STATES OF AMERICA, Plaintiff,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Answer.

The defendant for answer to the petition of plaintiff herein admits that it is a common carrier engaged in interstate commerce by railroading among the several states of the United States, including the states of Iowa, South Dakota, Montana, Wyoming and Nebraska.

Further answering, this defendant denies each and every allegation of said petition not hereinbefore specifically admitted to be true, and prays that it may be dismissed hence with its costs.

CHARLES J. GREENE,
Attorney for Defendant.

8 STATE OF NEBRASKA,
County of Douglas ss:

Charles J. Greene, being first duly sworn, says he is attorney for the above named defendant, which is a corporation; that he is authorized to verify the foregoing answer; that he has read the allegations thereof, and believes the same to be true.

CHARLES J. GREENE.

Subscribed in my presence and sworn to before me this 25th day of June, 1906.

M. F. CRITTENDEN,
Notary Public.

Endorsed: Filed Jun- 25, 1906. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 18th day of March, 1907, Replication was filed in said case, which said Replication is in words and figures following, to-wit:

U. S. District Court, District of Nebraska.

In the District Court of the United States in and for the District of Nebraska. In Equity. Omaha Division.

Doc. O. No. 88.

UNITED STATES
vs.
CHICAGO, BURLINGTON & QUINCY RY. CO.

The Replication of the United States, Plaintiff, to the Answer of Defendant.

This replicant, saving and reserving to itself, all, and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer, of the defendant, for replication thereunto, says that it does and will aver, maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant, is very uncertain, evasive, and insufficient in the law to be replied unto by the replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove, as this honorable Court shall direct, and humbly pray- as in and by its said bill it has already prayed.

CHARLES A. GOSS, *U. S. Att'y.*
Solicitor for Complainant.

Endorsed: Filed Mar. 18, 1907. R. C. Hoyt, Clerk.

9 Thereupon afterwards, to-wit: At the September Term, 1907, on the 3rd day of October, A. D. 1907, the following proceedings were had in said cases, as appear of record in Journal "W," page — of said Court, to-wit:

31-O.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Consolidated with Case No. 88-O for Trial.

Before Judge Thos. C. Munger.

By consent of parties hereto, it is ordered, by the Court, that this cause be and the same is consolidated with Case No. 88-O for trial.

88-O.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Consolidated with Case No. 31-O for Trial.

Before Thos. C. Munger, Judge.

By consent of parties hereto, it is ordered, by the Court, that this cause be and the same is consolidated with Case No. 31-O for trial.

31-O & 88-O. Consolidated.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Jury Empaneled, &c.

Before Judge Thos. C. Munger.

This cause, as consolidated, came on regularly for trial, the plaintiff appearing by Charles A. Goss, United States Attorney for the District of Nebraska, and Luther M. Walter, Special Assistant United States Attorney for the District of Nebraska, and the defendant by its counsel, Ralph W. Breckenridge:

It is thereupon Ordered, by the Court, that a jury come, to-wit:

1. Peter Rolland,
2. Chas. Brecht,
3. John Harvison,
4. Andrew Dill,
5. H. M. Sonnichsen,
6. Clarence D. Cass,
7. W. A. Case,
8. Albert Summers,
9. Geo. A. Munroe,
10. Theo. Menke,
11. Barton Mellott,
12. W. P. Storer.

Twelve good and lawful men, who are duly empaneled and sworn to try said cause. And thereupon said cause came on for hearing upon the pleadings and the evidence. The hour
10 of adjournment having arrived and the trial of said cause not being concluded, further proceedings in said cause are postponed until tomorrow at 9:30 A. M.

Thereupon afterwards, to-wit: At the said September Term, 1907, on the 4th day of October, 1907, the following proceedings were had in said case, as appear of record in Journal "W," page —, of said court, to-wit:

31-O & 88-O. Consolidated.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Trial Continued.

Before Judge Thos. C. Munger.

This day, again, come the parties hereto, the United States appearing by Charles A. Goss, and Luther M. Walter, and the Chicago, Burlington & Quincy Railway Company, by its counsel, Ralph W. Breckenridge; also, the jury heretofore duly empaneled and sworn to try said cause, as consolidated. Thereupon, the evidence is heard, and the trial of said cause not being concluded, and the hour of adjournment having arrived, further proceedings therein are postponed until tomorrow at 9:30 o'clock A. M.

Thereupon afterwards, to-wit: At the said September Term, 1907, on the 5th day of October, 1907, the following proceedings are had in said Court as appear of record in Journal "W." page —, of said Court, to-wit:

31-O & 88-O. Consolidated.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Trial Concluded. Verdict Directed.

Before Judge Thos. C. Munger.

This day, again, come the parties hereto, the United States appearing by Charles A. Goss, and Luther M. Walter, and the Chicago, Burlington & Quincy Railway Company, by its Counsel, Ralph W. Breckenridge; also, the jury heretofore duly empaneled and sworn to try said cause, as consolidated.

Thereupon the Court directed a verdict of "Guilty" as to each cause of action of the petitions filed herein. Whereupon, the jury returned verdicts in words and figures following, to-wit:

11 "In the District Court of the United States for the District of Nebraska.

No. 31. Doc. O.

THE UNITED STATES
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

We, the jury, duly empaneled and sworn to try the issues joined in the above entitled cause do find the said defendant, Chicago, Burlington & Quincy Railway Company, Guilty as to the First Count, Guilty as to the Second Count, Guilty as to the Third Count, in manner and form as charged in the petition therein.

PETER ROLLAND, *Foreman.*"

Endorsed: Filed Oct. 5, 1907. R. C. Hoyt, Clerk.

"In the District Court of the United States for the District of Nebraska.

No. 88. Doc. O.

THE UNITED STATES
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

Verdict.

We, the jury empaneled and sworn to try the issues joined in the above entitled cause do find the said defendant, Chicago, Burlington & Quincy Railway Company, Guilty in the manner and form as charged in the petition therein.

PETER ROLLAND, *Foreman.*"

Endorsed: Filed Oct. 5, 1907. R. C. Hoyt, Clerk.

To the ruling of the Court as to directing verdicts in favor of the plaintiff, and against the Chicago, Burlington & Quincy Railway Company, the defendant, by its counsel, duly excepts.

31-O & 88-O. Consolidated.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Judgment Entered.

Before Judge Thos. C. Munger.

Now comes Charles A. Goss, United States Attorney for the District of Nebraska, and moves the Court for a judgment against the defendant, Chicago, Burlington & Quincy Railway Company, and in favor of the plaintiff, on the pleadings and verdict, as rendered herein; It is thereupon—

Ordered, Adjudged and Decreed, by the Court, that judg-
12 ment be, and the same is hereby entered against the defendant, Chicago, Burlington & Quincy Railway Company, and in favor of the United States of America, for the sum of Three Hundred ($300.00) Dollars and costs of suit, in case No. 31-O; and—

Ordered, Adjudged and Decreed, by the Court, that judgment be, and the same is hereby entered against the defendant, Chicago, Burlington & Quincy Railway Company, and in favor of the United States of America, for the sum of One Hundred ($100.00) Dollars and costs of suit, in case No. 88-O.

Thereupon afterwards, to-wit: On the 4th day of December 1907, Stipulation was filed in said case, which said Stipulation is in words and figures following, to-wit:

United States District Court, District of Nebraska.

No. 88. Doc. O.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Stipulation.

This cause having by agreement been consolidated for trial with the case entitled United States of America, vs. Chicago, Burlington & Quincy Railway Company, docketed in the United States District Court for the District of Nebraska as O-31, it is hereby stipulated that a single bill of exceptions shall be settled in said consolidated case, and that one writ of error shall determine the rights of the parties therein.

Omaha: December fourth, 1907.

CHARLES A. GOSS,
United States Attorney.
RALPH W. BRECKENRIDGE,
CHARLES J. GREENE,
Attorneys for Defendant.

Endorsed: Filed Dec. 4, 1907. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the said 4th day of December 1907, Assignment of Errors was filed in said cases, which said Assignment of Errors is in words and figures following, to-wit:

United States District Court, District of Nebraska.

O-88. O-31.

UNITED STATES OF AMERICA, Plaintiff,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Assignment of Errors.

13 Comes now the Chicago, Burlington & Quincy Railway Company, the above named defendant and plaitniff in error, and assigns the following errors in the record and proceedings in the above entitled cause as follows:

I.

The Court erred in sustaining the motion of the plaintiff at the close of the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on K. C. F. S. & M. coal car No. 13567, involved in count one of the suit docketed in the United States District Court as O-31.

II.

The Court erred in instructing the jury with reference to said K. C. F. S. & M. coal car No. 13567 as follows:

"The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support the petition in each count provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute makes an offense whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict by instruction of the court on the part of the government.

There is considerable contrariety of opinion as to the proper construction of this act in decisions arising under it between the different courts. I have reached the conclusion that knowledge is not an element of the offense under the statute."

to which the defendant at the time duly excepted.

III.

The Court erred in instructing the jury with reference to said K. C. F. S. & M. coal car No. 13567, as follows:

"While it is admitted that Congress has the power to make certain acts which you designate an offense regardless of knowledge, and

it has failed to make knowledge an element by express words, and it must have been within the contemplation of Congress at the time this Act was passed that accidents were liable to occur between stations and liable to occur for some time before repairs could be made, and that, therefore, the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body, and its omission is intentional in order that this statute may provoke such a high degree of care and diligence

14 on the part of the railway company as if necessary to change the manner of inspecting appliances, and to compel the insurance of the lives and the safety of their employees provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the government on each count of the indictment."

to which the defendant at the time duly excepted.

IV.

The Court erred in overruling motion of defendant at the close of all the evidence to instruct the jury to return a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 80263, involved in count two of the suit docketed in the United States District Court as O-31.

V.

The court erred in sustaining the motion of the plaintiff at the close of the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 80263, involved in count two of the suit docketed in the United States District Court as O-31.

VI.

The court erred in instructing the jury with reference to said C., B. & Q. car No. 80263 as follows:

"The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support the petition in each count, provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute makes an offense whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict by instruction of the court on the part of the government.

There is considerable contrariety of opinion as to the proper construction of this act in decisions arising under it between the different

ourts. I have reached the conclusion that knowledge is not an lement of the offense under the statute."

o which defendant at the time duly excepted.

5 VII.

The court erred in instructing the jury with reference to said . B. & Q. coal car No. 80263 as follows:

"While it is admitted that Congress has the power to make certain cts which you designate an effense regardless of knowledge, and t has failed to make knowledge an element by express words. nd it must have been within the contemplation of Congress at the ime this Act was passed that accidents were liable to occur between tations and liable to occur for some time before repairs could be nade, and that, therefore, the failure to include knowledge as an lement of the offense must have been present in the mind of the nacting body, and its omission is intentional in order that this tatute may provoke such a high degree of care and diligence on the art of the railway company as if necessary to change the manner f inspecting appliances, and to compel the insurance of the lives nd the safety of their employees provided the accident occurs from defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to eturn a verdict for the government on each count of the indictment."

o which defendant at the time duly excepted.

VIII.

The court erred in overruling motion of defendant at the close f all the evidence to instruct the jury to return a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 86192, involved in count three of the suit docketed in the United States District Court as O-31.

IX.

The court erred in sustaining the motion of the plaintiff at the close of the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 86192, involved in count three of the suit docketed in the United States District Court as O-31.

X.

The court erred in instructing the jury with reference to said C. B. & Q. coal car No. 86192 as follows:

16 "The facts showin ga violation of the Act of Congress relating to safety appliances are sufficient to support the

petition in each count provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute makes an offense whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict by instruction of the court on the part of the government.

There is considerable contrariety of opinion as to the proper construction of this act in decisions arising under it between the different courts. I have reached the conclusion that knowledge is not an element of the offense under the statute."

to which the defendant at the time duly excepted.

XI.

The court erred in instructing the jury with reference to said C. B. & Q. coal car No. 86192 as follows:

"While it is admitted that Congress has the power to make certain acts which you designate an offense regardless of knowledge, and it has failed to make knowledge an element by express words, and it must have been within the contemplation of Congress at the time this act was passed that accidents were liable to occur between stations and liable to occur for some time before repairs could be made, and that, therefore, the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body, and its omission is intentional in order that this statute may provoke such a high degree of care and diligence on the part of the railway company as if necessary to change the manner of inspecting appliances, and to compel the insurance of the lives and the safety of their employees provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the government on each count of the indictment."

to which defendant at the time duly excepted.

XII.

The court erred in overruling the motion of defendant at the close of all the evidence to instruct the jury to return a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on Northern Pacific coal car No. 5764, involved in the suit docketed in the United States District Court as O-88.

17 XIII.

The court erred in sustaining the motion of the plaintiff at the close of all the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty

accruing by reason of an alleged defect in the safety appliance on Northern Pacific coal car No. 5764, involved in the suit docketed in the United States District Court as O-88.

XIV.

The court erred in instructing the jury with reference to said Northern Pacific car No. 5764, as follows:

"The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support the petition in each count provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute makes an offense whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict by instruction of the court on the part of the government.

There is considerable contrariety of opinion as to the proper construction of this act in decisions arising under it between the different courts. I have reached the conclusion that knowledge is not an element of the offense under the statute."

to which defendant at the time duly excepted.

XV.

The court erer in instructing the jury with reference to said Northern Pacific car No. 5764, as follows:

"While it is admitted that Congress has the power to make certain acts which you designate an offense regardless of knowledge, and it has failed to make knowledge an element by express words, and it must have been within the contemplation of Congress at the time this Act was passed that accidents were liable to occur between stations and liable to occur for some time before repairs could be made, and that, therefore, the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body, and its omission is intentional in order that this statute may provoke such a high degree of care and diligence on the part of the railway company as if necessary to change the manner of inspecting appliances, and to compel the insurance of
18 the lives and the safety of their employees provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the government on each count of the indictment."

to which defendant at the time duly excepted.

Wherefore, defendant and plaintiff in error prays for a reversal of said judgment and for such other relief as it is of right entitled to have.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Chicago, Burlington & Quincy Railway Company.

Endorsed: Filed Dec. 4, 1907. R. C. Hoyt, Clerk.
3—602

Thereupon afterwards, to-wit: At the said September Term, 1907, on the said 4th day of December, 1907, Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond was duly signed and filed in said case, which said Order is in words and figures following, to-wit:

United States District Court, District of Nebraska.

O-31. O-88.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

Order Allowing Writ and Fixing Amount of Supersedeas Bond.

On this fourth day of December, A. D. 1907. upon the filing of assignments or error herein, writ of error is allowed. Citation is issued upon giving bond in the sum of one thousand ($1,000.00) dollars, with good and sufficient surety.

By the Court,

WM. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 4, 1907. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the said 4th day of December, 1907, Supersedeas Bond was filed in said case which said Bond is in words and figures following, to-wit:

United States District Court, District of Nebraska.

O-31. O-88.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant.

19 *Supersedeas Bond.*

Know all men by these presents:

That we, Chicago, Burlington & Quincy Railway Company as principal, and Henry W. Yates as surety are held and firmly bound unto the United States of America in the full and just sum of one thousand ($1,000.) dollars to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this fourth day of December, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the September Term, A. D. 1907, of the District Court of the United States for the District of Nebraska, in a

suit depending in said court between the United States of America and the Chicago, Burlington & Quincy Railway Company judgment was rendered against the said Chicago, Burlington & Quincy Railway Company and the said railway company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Chicago, Burlington & Quincy Railway Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.
By CHAS. J. GREENE &
RALPH W. BRECKENRIDGE,
Its Attorneys.

[SEAL] HENRY W. YATES.

Approved by,

WM. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 4, 1907. R. C. Hoyt, Clerk.

Citation.

United States Circuit Court of Appeals. (Error.)

THE UNITED STATES OF AMERICA.

To United States of America:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit,
20 at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the district of Nebraska, wherein Chicago, Burlington & Quincy Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William H. Munger, Judge of the district court of the United States for the district of Nebraska, this fourth day of December in the year of our Lord one thousand nine hundred and seven.

W. H. MUNGER,
United States District Judge, for the District of Nebraska.

Service of the above Citation accepted, this fourth day of December, A. D. 1907.

CHARLES A. GOSS,
United States Attorney.

O-88. O.-31. United States District Court, District of Nebraska. United States of America, Plaintiff, v. Chicago, Burlington & Quincy Railway Company, Defendant. Citation. Filed at —— M., Dec. 4, 1907. R. C. Hoyt, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the Honorable Judges of the District court of the United States for the District of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at the September term, 1907, thereof, between United States of America, plaintiff, and Chicago, Burlington & Quincy Railway Company, defendant, a manifest error has happened, to the great damage of the said Chicago, Burlington & Quincy Railway Company as by its complaint it appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
21 same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States circuit court of appeals for the eighth circuit, on or before the 2nd day of February, 1908, to the end that the record and proceedings aforesaid be- inspected. The United States court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourth day of December, in the year of our Lord, one thousand nine hundred and seven.

Issued at the office in the City of Omaha, Nebraska, with the seal of the district court of the United States for the district of Nebraska, dated as aforesaid.

[Seal U. S. District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
Clerk District Court of the United States,
District of Nebraska.

Return to Writ.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court, at office in the City of Omaha, this 29th day of January, A. D. 1908.

R. C. HOYT,
Clerk of said Court.

O—88. O—31. United States District Court, District of Nebraska. United States of America, Plaintiff, v. Chicago, Burlington & Quincy Railway Company, Defendant. Writ. Filed at — M. Dec. 4, 1907. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 18th day of December 1907, Bill of Exceptions was filed in said case, which said Bill of Exceptions is in words and figures following, to-wit:

22 In the District Court of the United States for the District of Nebraska.

31-O. 88-O.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that on the 3rd day of October, 1907, at the September 1907 Term of the District Court of the United States for the District of Nebraska, Hon. T. C. Munger, presiding, the above entitled cause was called for trial and a jury empanelled therein, and the trial commenced and continued until and including the 5th day of October, 1907; Luther M. Walter and Charles A. Goss appearing for the plaintiff, and Charles J. Greene and Ralph W. Breckenridge for defendant; at which said trial, the plaintiff and defendant introduced and offered evidence as hereinafter set forth, and objections were made thereto, rulings had thereon and exceptions taken to the same as follows, to-wit:

After empanelling the jury, adjournment was taken to 9:30 A. M. October 4th, 1907.

Pursuant to adjournment at 9:30 o'clock October 4, 1907, the following proceedings were had:

By Mr. WALTER: May it please the Court, gentlemen of the Jury; I will try in as brief a manner as I can to tell you what the issues are in the case, what the United States contends for, so that you may understand in an intelligent way the course of the trial as it proceeds.

The Congress has enacted a statute and we claim the penalty from the defendant because, as we say, it violated that statute. There are four cars in this case that were hauled by the Burlington Railway Company, which, as the evidence will show, were defective under the safety appliance law; that is, they were not in such condition as to comply with the requirements of the statute.

The first car is Kansas City, Ft. Scott & Memphis coal car #13567. That car, well in fact the first three cars, were hauled to the city of Omaha from what is known as the South yards, the Gibson yards, up into Omaha. This first car was hauled on the 8th day of August. The chains on the A end of the car were broken in such a way as to sever the connection between this lever and the pin which holds this knuckle fast to keep it from opening and letting the cars separate, so that to operate it a man had to go in there and take hold of
23 the pin with his hand, and in that way raise it up so that the knuckle could be opened. Now in that condition that car loaded with coal which came from a point outside of the state of Nebraska, was hauled up into Omaha.

The second car was a "Q" coal car, #80263. That car was in identically the same condition except the chain that was broken on the B end, that is where the break staff is located; so that the same defect existed in each of these two cars. That car was likewise loaded with coal coming from Tyrone, Iowa, to Omaha, Nebraska.

Also on the 9th of August, and on the same day, another "Q" coal car #86192, was hauled along with this second car, the one just mentioned, and this one were together. The defect in this particular car was at the grab iron on the end sill here on the right hand side as you face the end that has the break staff; that grab iron was missing, the thing was left showing that it had a violent blow, had been wrenched loose; there were the signs indicating that the grab iron had been there, but that it had been torn loose.

From the place where these cars were hauled the defendants had employés to repair, but no repairs were made. In one instance one of these cars was taken and offered to a connecting line in that condition. They refused to accept it, sent it back and made the defendant repair it. Now those are the three cars.

The fourth car was a Northern Pacific car #5764. That car was hauled by the defendant in January of the past year, January, 1906. It was taken from Seneca, Nebraska, to Alliance, Nebraska, a distance of over a hundred miles. At Seneca and at Alliance in each place the clevis, that is this little piece here, was missing, the pin had become lost, the little pin which passes through the clevis pin, let the clevis pin out and the clevis was gone, so that there

was no connection in that case between the lever and the lock pin or lock block which goes down in behind the knuckle so it can't open. That car was an empty car, but it was going in a train with other cars which themselves had traffic brought from one state to another.

Now these are the four cars, Gentlemen of the Jury, which we contend that the defendant had violated the statute and the question which will be submitted to you is whether the defendant owes the United States the $400, or any part of it. It is not a criminal prosecution, it is a civil action, and the question submitted to you will be, whether you find for the plaintiff or for the defendant, and it
24 is as was suggested in some of the questions asked you, a similar case as to an action between two of your neighbors, whether you on a jury, would find for one or for the other. The law fixes the exact penalty. It is a hundred dollars, and we contend that in this case they owe it to us. Now the Government, in order to enforce its statute, all of its statutes in fact, has certain persons employed, in this case they are known as safety appliance inspectors, railroad men, selected because of their long experience and their capacity as men. They have to cover the entire range of the country. They may be here this week and some place else next week. They are acting under an oath of office, and we will bring before you to substantiate our claim these men, who will testify as to what they found out as to these particular four cars. If the evidence discloses the facts which I have stated to you, the Government contends that it shall have a judgment for the full amount sued for, four hundred dollars.

By Mr. BRECKENRIDGE: Mr. Walter, before you finish your statement, I wish to call your attention to the last car to which you refer, viz, Northern Pacific car #5764, is the car which is referred to in the suit known as Docket O-88, is it not?

By Mr. WALTER: Yes, sir.

By Mr. BRECKENRIDGE: From the statement of counsel with respect to the facts which he expects to prove in O-88, the defendant moves the court for an instruction in its favor.

By Mr. WALTER: On what particular ground?

By Mr. BRECKENRIDGE: No cause of action.

By the COURT: What is the ground?

By Mr. BRECKENRIDGE: The ground is that this car is not shown itself to have been engaged in interstate traffic nor does the statement itself show that it was moved in interstate business.

By the COURT: Your motion will be overruled at this time.

To which defendant excepts.

By Mr. BRECKENRIDGE: It is stipulated by and between the plaintiff and defendant that the defendant, the Chicago, Burlington & Quincy Railway Company is a corporation and a common carrier and engaged in interstate commerce by railroad. That applies to both cases.

It is further stipulated that car No. 13567, K. C. F. S. & M., was, on August 8, 1905, then being hauled on defendant's rail-

road and then contained merchandise consisting of coal, con-
25 signed from a point outside the state of Nebraska to a point in the state of Nebraska.

It is further stipulated that C. B. & Q. coal car #80263, and C. B. & Q. coal car 86192 received in Omaha, Nebraska, on or about August 9, 1905, had been hauled on the defendant's line of railroad from Tyrone, Iowa, and was loaded with coal consigned from Tyrone, Iowa, to Omaha.

It is further stipulated that Northern Pacific car #5764 was on January 26, 1906, in a train moving [*our*] of Seneca, Nebraska, in a northwesterly direction, which had in it three other cars carrying interstate merchandise, to-wit: C. I. L. #11995, V. R. #10721, both loaded with piling and consigned from a point in Nebraska to a point in Wyoming, and M. T. car #83160, loaded with rails consigned from a point in Nebraska to a point in Wyoming. This Northern Pacific car #5764 was an empty car, and was empty for the entire trip; and was going home to the Northern Pacific R. R. Co.

WILLIAM R. WRIGHT, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. WALTER:

Q. What is your business?

A. Inspector of safety appliances for the Interstate Commerce Commission.

Q. What is your residence?

A. Kansas City, Missouri.

Q. How long have you occupied your present position?

A. Since January, 1902.

Q. Prior to that what was your business?

A. I was in the railroad service.

Q. How many years?

Mr. BRECKENRIDGE: Objected to as immaterial.

Overruled and defendant excepts.

A. Twenty years.

Q. In what capacity?

A. As brakeman, conductor, yardmaster and trainmaster.

Q. With what railroads?

Mr. BRECKENRIDGE: Objected to as immaterial, irrelevant and incompetent under the issues in the case.

Overruled and defendant excepts.

Mr. BRECKENRIDGE: The objection applies to all this line of questions.

A. Chicago & Alton, Columbus & Southern and the Sault Railway.

Q. As an inspector of safety appliances in the employ of the Interstate Commerce Commission, what are your duties?

26 Mr. BRECKENRIDGE: Defendant objects to the question as incompetent.

Overruled and defendant excepts.

A. To inspect railway equipment.
Q. For what appliances?
A. For the condition of safety appliances, air brakes, etc.

Mr. BRECKENRIDGE: The defendant objects to the question as not the best evidence.
Overruled and defendant excepts.

Q. What do you inspect?
A. The condition of safety appliances.
Q. Well, what are they?
A. The automatic couplers and the mechanism thereto, and the height of drawbars, air brakes, grab irons and hand holds.
Q. Now, where were you on or about August 9, 1905?
A. Omaha, Nebraska.
Q. And August 8, where were you?
A. Omaha, Nebraska.
Q. Were you then or not engaged in your duties as safety appliance inspector?
A. I was, yes sir.
Q. Did you on or about August 8, 1905, inspect K. C., *S. F.*, & M. car #13567?
A. I did, yes sir.
Q. Where did you first see that car?
A. In the Gibson yard of the C. B. & Q.
Q. Where is the Gibson yard?
A. Located about two miles south of Omaha.
Q. In Nebraska?
A. Yes sir.
Q. What time was it when you first saw that car?
A. At 8:20 or about that.

By Mr. BRECKENRIDGE:

Q. Are you testifying from your own recollection or from the book you hold in your hand?
A. From the notes I made at the time.
Q. Have you any independent recollection without reference to the notes?
A. Partially, yes sir.
Q. Are you able to testify without referring to the book?
A. I would not say that I am able to do that always.

By Mr. BRECKENRIDGE: The defendant objects to the testimony as incompetent. He is attempting to read the record.
By the COURT: You need not answer the next question until defendant has an opportunity to object.

By Mr. WALTER:

Q. Did you make any notes at that time?
A. I did, yes sir.

Q. Were they made by you in your own handwriting [as] the immediate time?

A. Yes sir.

27 Q. You have had them in your constant possession?

A. Yes sir.

Q. Are they in the same condition as when you first made them?

A. They are, yes sir.

By Mr. WALTER: If your Honor please, I submit that the witness may properly refresh his memory from these notes and testify from his memory as refreshed by these notes.

By the COURT: Well, ask the question.

Q. Now, where was the car when you first saw it?

By Mr. BRECKENRIDGE:

Q. I notice that just about as you were to answer that question you opened the book in your hand?

A. Yes sir.

Q. Is that the record concerning which you were asked a moment ago?

A. I don't just understand you.

Q. Is the book to which you referred before starting to answer the last question asked you by Mr. Walter the book or the notes which you said in response to his question were made at the time you inspected this car?

A. Yes sir.

Q. Now, you have no independent recollection have you, of the work you did that morning?

A. Oh, yes, I remember——

Q. You know what you are expected to testify to because you have been over this with Mr. Walter, haven't you?

A. Yes sir.

Q. And you have had an understanding between you as to the line of your testimony, haven't you?

A. Well, I understand that I am to testify from my recollection, my memory being refreshed from my notes.

Q. You have been in court so many times you know that that is a thing you can do, refresh your memory from your notes and then practically read out of the book?

A. Yes sir.

Q. Now, then, you haven't an independent recollection of that occasion, have you?

A. I have an independent recollection of these occasions, yes sir.

Q. Of this particular occasion?

A. Yes sir.

Q. Have you an independent recollection that you can testify from without using your notes?

A. Yes, I have.

Q. Then I wish you would do that.

A. I could not cover every particular feature——

By Mr. BRECKENRIDGE: If the record is to be read, if your Honor please, I would like to have it go in as a record.

By the COURT: The record has not been offered yet, and that is not ready to rule on. So far as the witness testifying from
28 his recollection he can do so; so far as refreshing his memory we will have to reach that when we come to it.

By the COURT:

Q. Mr. Witness, is part of your testimony here dependent upon the notes you made at the time?

A. In a measure, yes.

Q. Can you refresh your recollection by reference to those notes, do you testify after refreshing your memory by referring to your notes?

A. Yes sir.

Q. And upon referring to those notes is your memory then so strengthened that you are able to testify to the fact independently of the notes?

A. I think so, yes sir.

By Mr. BRECKENRIDGE:

Q. That is, you commit to memory what you have got in the book, is that the idea?

A. If I did, then it would not be necessary for me to refer to the book.

Q. Of course, but I say you commit to memory what you find in the book, that is the kind of recollection you have of it, is it not?

A. Well, if you want to call it that, perhaps that is the way of it; I do not commit it to memory because when I read this over now I perhaps in an hour from now could not recall exactly what my notes said without referring to them again.

Q. No, but you commit it to memory for the purpose of this testimony, don't you?

A. I refer to my notes, yes sir.

Q. You have not answered my question, you commit the contents of that book to memory for the purpose of testifying with regard to this particular matter at this particular time, do you not?

A. Well, I don't think so.

By Mr. WALTER:

Q. At that time Mr. Wright did you examine the condition of the couplers on that car?

A. I did, yes sir.

Q. In what condition were they as to the A end of the car?

A. The uncoupling chain was broken, to my recollection.

Q. What is the purpose of the uncoupling chain?

By Mr. BRECKENRIDGE: The defendant objects to the question as incompetent and not a subject matter of expert testimony.

Overruled and defendant excepts.

A. The purpose of the chain is to connect the uncoupling lever with the lock block on the uncoupling apparatus.

29 Q. Now, in the condition in which you found that coupler on the A end of the car could it be operated by use of its own mechanism without a man going between the ends of the cars?

By Mr. BRECKENRIDGE: The defendant objects to the question in the form in which it is put, as argumentative and calling for the specific answer required.

Sustained and plaintiff excepts.

Q. Mr. Wright, in the condition in which that coupler was at the time what would have to be done in order to operate that coupler?

By Mr. BRECKENRIDGE: The defendant objects to the question as incompetent and irrelevant, for the condition of the appliance has not been described.

Overruled and defendant excepts.

A. It would be necessary for a man to go between the cars and raise the lock block with his hand.

Q. Did you see that car moved?

A. I did; yes sir.

Q. What was done with it?

A. It was taken from the Gibson yard and hauled down to what is known as the lower yard just north of the U. P. bridge.

Q. What engine took the car, if any?

A. May I refer to my notes on that?

By Mr. BRECKENRIDGE: The defendant objects to the question as immaterial.

Overruled and defendant excepts.

By Mr. BRECKENRIDGE: And I further object to the witness testifying from his record unless he has an independent recollection.

By the COURT: You can lay the foundation for reference to this car number if you like.

Q. Do you remember the number of the engine independently of any notes made at the time?

A. I think it was 1663, I am not sure as to that.

Q. If you are not sure I ask that he be permitted to refresh his memory from the notes made at the time; refresh your memory Mr. Wright and tell us what the number was.

A. Engine 1369.

Q. Where did that engine take the car?

A. It hauled it from the Gibson yard to what is known as the lower yard just north of the U. P. bridge.

Q. Was that coupler in the same condition as when you first saw it?

30 By Mr. BRECKENRIDGE: Defendant objects to the question as leading and argumentative, calls for his conclusion.

Overruled and defendant excepts.

A. Yes sir; it was.

Q. You examined the coupler?
A. I examined it.
Q. Now, Mr. Wright, where was that car placed when it was brought into the Douglas street yard?
A. The car was switched into the Douglas street yard and a cut made between that car and another car during the time they were switching in the Douglas street yard.

By Mr. BRECKENRIDGE: I do not understand the phrase.

Q. What do you mean by the word "cut?"
A. Train or transfer, usually called "cuts."
Q. The number of cars together is a cut?
A. The number of cars together.
Q. You say that car was switched to the Douglas street yard?
A. Yes sir.
Q. Was it or was it not uncoupled from another car?
A. It was.
Q. Did any employee go between that car and another car in order to make that uncoupling?
By the COURT: He can state in another way.
Q. Was that car uncoupled from another car?
A. Yes, sir.
Q. How?
A. By a man going between the ends of the cars.
Q. Do you know who the man was?
A. I have his name, yes sir.
Q. What was his name?
A. Frank Wood.
Q. Were there any other cars with this 13567 when it was brought up from the Gibson's station yard?
A. Yes sir, there was about in the neighborhood of 30 cars, in the cut.
Q. Do you know whether there are any repair men or inspectors at Gibson?
A. Well, we let a man——

By Mr. BRECKENRIDGE: The defendant objects as not responsive, that calls for a direct answer whether he knows or not.

By the COURT: You may state yes or no.
A. Yes.
Q. Well now, were there?
A. Yes sir.
Q. How many?
A. Two at that time.
Q. Do you know whether Gibson is for certain trains a division terminal?
31 A. It is, there is a roundhouse there, engines are taken off their trains there, take their trains from there, some trains pull in there and set out part of their trains and proceed to South Omaha, others proceed through to Douglas street yard after setting out part of their trains there.

Q. Where were you on August 9th?
A. Omaha, Nebraska.
Q. Did you inspect on August 9th C. B. & Q. Coal car #80,263?
A. May I refer to my notes on that?
Q. If you are unable to answer independent of your notes, you may refresh your memory.
A. #80,263, yes sir.
Q. Where did you first see that car?
A. In the Gibson yard.
Q. At what time of day?
A. Seven thirty a. m. I first saw it.
Q. Did you inspect that car as to its couplers on the B end?
A. Yes sir.
Q. In what condition were they?
A. May I refer to my notes on that?
By Mr. BRECKENRIDGE: You cannot answer the question propounded by Counsel here without referring to your note book, can you?
A. I think that I could answer, but I am not certain; I have had a good many cars with the various classes of defects and I do not wish to be mistaken about it.
Q. Well, you have no independent recollection as a matter of fact, have you?
A. Oh, yes.
Q. Can't you testify from your independent recollection and leave your notes to one side?
A. Well, I would not want to; it is two years ago you know since this was done.

By Mr. WALTER: I submit that in a matter of this kind it is practically impossible.
By the COURT: Well, if he says he cannot testify from his recollection, he is then permitted to refresh his memory from a memorandum provided that when he looks at the memorandum his memory is so refreshed that he can testify or that he knows the facts stated in that memorandum are true as they then existed.

Q. When you inspected this car #80,263 did you make notes at the time?
A. I did, yes sir.
Q. Were they in your own handwriting?
A. Yes, sir.
Q. At the immediate time?
A. Yes sir.
Q. Have you had them in your possession all the time since?
A. Yes sir.
32 Q. Are they now in the same condition as when first made?
A. Yes sir.
Q. Were they then true and correct?
A. They were.
Q. Are you able without refreshing your memory to state what

the particular defect was in and on the B end of this particular car 80,263?

A. No, I don't think that I could. I see there were two cars that day and I might possible be mistaken.

Q. Now, as refreshed by your notes, what was the particular defect in and on the B end of this particular car 80,263?

By Mr. BRECKENRIDGE: The defendant objects to the question as incompetent, he has not complied with the foundation which your Honor said must be first laid. He has not testified, in other words, that by examining [*there*] notes he can either by committing to memory or by refreshing whatever independent recollection he has can testify.

Overruled, and defendant excepts.

A. The bottom clevis was missing on the B end of the car.

Q. Was the lever attached or detached from the lock pin or lock block?

A. It was detached from the lock pin.

Q. In order to couple that car or uncouple it from the car to which it might be coupled, what must be done?

A. It could not be uncoupled without the necessity of a man going between the ends of the cars raising the lock block by hand.

Q. Did you see that car moved?

A. I did, yes sir.

Q. What was done with it?

A. It was hauled from the Gibson yard to the Douglas street yard and placed on track No. 12.

Q. What engine hauled that car?

A. Well, I don't believe I can recall the number of that engine without refreshing my memory.

Q. You made notes at the time?

A. Yes sir, the number is 1663.

Q. Did you inspect that car when it again arrived in the Douglas street yard?

[4]. Was it or not in the same condition as when you first inspected it?

A. Precisely the same condition.

Q. Were there any other cars in the cut hauled up with it?

A. Yes sir.

Q. Do you know how many?

A. No, I could not recall just how many cars, part of the train or cut that was brought from Gibson yard was left in the lower yard down near the U. P. bridge, the remainder of them was
33 brought up and switched in on various tracks in the Douglas street yard.

Q. Was this car in the cut that was left in the lower yard or in the part brought up to Douglas street yard?

A. Brought up to Douglas street.

Q. What was done with that car when brought up to the Douglas street yard?

A. Placed on track No. 12.

Q. Did you see it moved from there?
A. No sir.
Q. Did you on August 9, 1905, inspect C. B. & Q. car #86,192?
A. I did.
Q. Did you make notes at the time?
A. I did, yes sir.
Q. Have you had them in your possession continuously since?
A. I have.
Q. Have they been changed or are they in the same condition as when you first made them?
A. Same condition.
Q. Were they true and correct when made?
A. Yes sir.
Q. Where was that car when you first saw it?
A. In the Gibson yard.
Q. Did you inspect it as to grab irons on the B end?
A. I did, yes sir.
Q. What did you find?
A. Found that it had one grab iron broken and missing on the B end of the car on the opposite side from the uncoupling lever.
Q. By the use of the model can you show to the jury what grab iron was missing?
A. Yes sir.
Q. Please do so.

By Mr. BRECKENRIDGE: Are you offering this model as an exhibit in this case.

By Mr. WALTER: For the purpose of illustration, yes sir.

By Mr. BRECKENRIDGE: If you want to use this as an illustration, I insist upon its being offered in evidence.

By the COURT: You would not be entitled to refer to a model not in evidence unless it is for the purpose of identifying it in order to offer it in evidence.

By Mr. GOSS: If your Honor please, we can lay the foundation, can we not, just the same as where accident happens, for introducing it in evidence.

By the COURT: Well, I have not heard any foundation yet.

Q. Mr. Wright, will you note the cars on the table and state whether or not these are true and correct models of a flat car and box car in ordinary use on the railroads of the country?

34 A. They are a fair model, they are not strictly up to date in some particulars.
Q. As to couplers and grab irons, are they?
A. As to couplers and hand holds, they are——

By Mr. BRECKENRIDGE: That question is objected to.

By Mr. WALTER: I will put it in another form.

Q. I will ask you whether or not the grab irons or hand holds and the coupling appliances on these two particular cars are representative of couplers and grab irons and hand holds on the cars which have been referred to in this case and which you inspected?

By Mr. BRECKENRIDGE: Objected to for the reason that the model ought to be such a one as the law requires and it is not for him to state.

By the COURT: This question is whether this is a fair model of these cars that he inspected.

By Mr. BRECKENRIDGE: That isn't the question—Well, I don't object to that question.

A. They are, yes sir.

Q. Now, will you show to the jury what defects, if any, existed on this car #86,192?

By Mr. BRECKENRIDGE: Objected to as irrelevant and incompetent. Sustained and plaintiff excepts.

By Mr. BRECKENRIDGE: If you are not going to offer the cars in evidence, I think it only fair that this visible evidence should be removed.

By Mr. WALTER: If your Honor please, we are perfectly willing that they be removed from the court room.

By Mr. BRECKENRIDGE: We would not annoy you, but we want you to offer them in evidence if you are going to use them.

By Mr. WALTER: We decided not to offer the models in evidence.

By the COURT: You may proceed with the questions to the witness.

Q. We will proceed on another line. What, if any, defect existed on this particular car #86,192 on the B end?

A. It had the grab iron broken off and missing from the B end of the car on the opposite side of the coupling lever.

Q. Facing the B end of the car, which side?

A. The right hand side.

Q. Was there any portion of the grab iron remaining?

35 A. There was the eye through which the lag screw or bolt goes to attach or fasten the grab iron to the end of the car, both eyes were remaining fast to the lag screw, the remainder of the grab bolt was missing.

Q. Was there any portion of the grab iron remaining that would serve as a hand hold or grab iron?

A. Nothing whatever.

Q. Was there anything remaining on that side of the car that would serve as a grab iron or hand hold?

By Mr. BRECKENRIDGE: Objected to as wholly incompetent, irrelevant and immaterial.

Overruled and defendant excepts.

A. No sir.

Q. Did you see that car moved?

A. I did.

Q. Where was it moved from and to?

A. Removed from the Gibson yard to the Douglas street yard.

Q. By what engine?

A. 1663 I think I testified to.

Q. Of the C. B. & Q. Railway Company?

A. Yes sir.

Q. Was it in a cut with other cars or not?
A. It was.
Q. How many cars?
A. Well, I can't say the exact number of cars.
Q. Well, about how many?
A. Perhaps 15 or 25 cars.
Q. State what movement took place?
A. The cut was hauled from the Gibson yard up to and through what is known as the lower yard, when part of the cut was left; the remainder of the cut was taken up to Douglas street.
Q. Did you inspect it upon its arrival in the Douglas street yard?
A. Not other than just to note that its condition was the same as it was at Gibson.
Q. You refer now to the grab iron or something else?
A. To the grab iron.
Q. Was it or not still missing from the car?
A. Still missing.
Q. Did you see that car moved again?
A. No sir.
Q. Was it repaired?

By Mr. BRECKENRIDGE: The defendant objects to the question as incompetent, the witness is incompetent. Sustained and plaintiff excepts.

Q. I will ask you whether or not there was any one with you when you made these inspections on these three cars?
A. Mr. Ensign, inspector.
Q. Who is Mr. Ensign?
A. Inspector of safety appliances, Interstate Commerce Commission.

36 Cross-examination.

By Mr. BRECKENRIDGE:

Q. Mr. Wright, your work in connection with the inspection of safety appliances takes you all over the country, does it?
A. Well, over a good portion of the country, yes sir.
Q. And you inspectors usually travel in pairs, do you?
A. Well, we have to travel that way very frequently.
Q. And do you both make notes at the same time?
A. Of violations, yes sir, what we consider violations of the law.
Q. Oh, then you pass upon that question at the time, do you?
A. Yes sir.
Q. The judgment is entered at the time you make the note?
A. Well, we pass upon the condition of the car, yes.
Q. And why do you travel in pairs?
A. This taking of evidence as to the violation of the safety appliance law——
Q. So as to cinch the testimony, isn't it?
A. It is to have the evidence of more than one witness as to the condition of the equipment.

Q. Now, then, with respect to this car No. 13,567, that inspection you made at Gibson on the 8th day of August, 1905, didn't you?

A. Yes sir.

Q. What time of day was that?

A. I think I first saw that car about 8.20 in the morning.

Q. Was Mr. Ensign with you that morning?

A. Yes sir.

Q. Were you staying at Gibson or South Omaha or Omaha or where?

A. Staying in Omaha.

Q. And you got up early and went down there to Gibson?

A. We got up and went down on a Burlington yard engine in the morning.

Q. Who gave you permission to go over on the Burlington yard engine?

A. Why, I don't think that we asked permission of any person, simply climbed on the engine and talked with the crew as we went down, rode down on the engine.

Q. Now, this station at Gibson you have referred to as a division station, division point?

A. Yes, division terminal.

Q. Well, now, didn't you know that that is not true of Gibson?

A. No, I don't.

Q. Don't you know that all that is done at Gibson is simply to distribute the cars there towards South Omaha and up to the Douglas street yards?

A. Well, I——

Q. What else is done there?

A. I stated in my——

Q. Never mind what you stated before, what is done with the cars that come into Gibson?

37 A. Trains arriving in Gibson were frequently stopped there, the engines cut off and send them around down in the train, the entire train switched and handled from Gibson by the yard engines. Other trains——

Q. That is practically a part of the Omaha yards, isn't it?

A. No, that is the Gibson yard.

Q. Well, it is part of the system of the yards here, the freight yards and the round house there?

A. It is an outlying yard known as the Gibson yard, not known as the Omaha yard, and any point where trains are turned or made up, which is a stopping place for trains and crews changed is a division terminal.

Q. Yes, but the yard crew simply takes these cars there and distributes them to the places where they are to go, isn't that true?

A. No answer.

Q. Can't you answer my question, Mr. Wright?

A. Will you let me finish telling you why this is a division terminal; you asked me that question.

Q. Yes sir; but I thought you finished that; define what you mean by division terminal, then?

A. A point where trains terminate their run.
Q. That is what you mean by a division terminal?
A. Yes sir.
Q. Now, the trains that are in Gibson were trains that contained cars which were to be distributed to one point and another, were they not?
A. Undoubtedly.
Q. South Omaha and the freight yards?
A. Yes sir.
Q. The through trains did not come that way, did they?
A. Part of them come that way, part set out of the train at Gibson and proceed to South Omaha, part of them set out some cars there and come on to Omaha.
Q. But the cars that were set out to be sent to South Omaha were to be billed there, were they not?
A. Undoubtedly.
Q. So that it was simply a distributing point, where the cars going to one terminal or another, the Stockyards or the freight house in Omaha were sent on to places where they were to be unloaded?
A. Yes, it was a junction point as well as a terminal.
Q. You say it was both, you use the word terminal because it is the end of the regular train run?
A. Yes sir.
Q. And not on account of the character of the appliances made use of by the railroad company for the business?
A. It is due to the fact that crews are stopped there, turned there and engines are housed there and cared for there and it is a repair point.
Q. That is a repair point?
A. Yes, where men are kept employed there.
38 Q. Repair point for engines, isn't it?
A. Well, and for cars because I met and talked with the man whose duty it was to do that.

By Mr. BRECKENRIDGE: I move to strike that part of his answer from the record as hearsay, beginning with the word "because."
Sustained and plaintiff excepts.

Q. You never saw any cars repaired there at Gibson, did you?
A. No, these that I saw——
Q. That is enough, you never saw any cars repaired there, did you?
A. No sir.
Q. Now, then with respect to this coal car No. 13,567 you saw it moved from Gibson and to South Omaha?
A. Yes sir.
Q. I didn't mean to South Omaha——
A. From Gibson up to what is known as the lower yards.
Q. That is down here——
A. Down here by the Union Pacific bridge.
Q. Did you ride up with it?
A. Yes sir.

Q. Mr. Ensign ride up with that too?
A. Yes sir.
Q. And that was the last you saw of it?
A. No, it was switched there in the Douglas street yard and later it was taken and delivered to the——
Q. No, that was the last time you saw of it as far as you testified; I don't remember that your testimony came beyond the trip that you took with it from Gibson up to the Omaha yard; you rode up on that car to South Omaha, I should say to the Douglas street yard?
A. I understood you, you meant the lower yard.
Q. Did you put any marks on that car yourself?
A. No sir.
Q. Did you take any from it?
A. No sir.
Q. Did you take any tickets from it?
A. No sir.
Q. Now, what do you say was the matter with it?
A. The uncoupling chain was broken.
Q. The coupling chain was broken?
A. The uncoupling chain.
Q. Now, that uncoupling chain is coupled to the pin, isn't it, that goes in to place the coupling in that holds the two cars.
A. It connects the uncoupling lever with the lock block.
Q. That is a part of the coupling appliance?
A. That is a part of the uncoupling mechanism.
Q. And the chain you say was broken?
A. Broken.
Q. Did you see anybody go in between the cars in that particular case to couple it or uncouple it?
A. I did, yes sir.
Q. Now, you have given the name of the man that you saw go in there?
A. Yes, I gave it from my recollection.
39 Q. Yes, you said his name was Wood.
A. Yes, the foreman of the engine crew.
Q. Where was this car, next to the engine?
A. No sir, it was somewhere——
Q. Now, the engine crew is the switching crew, isn't it?
A. Yes sir.
Q. And they were just switching this car from one place to another?
A. Well, they had brought this cut down from the Gibson yard and on their arrival in the lower yard as they pushed them in there all in the one movement this man went in between the cars and raised the lock block with his hand for the purpose of making the coupling.
Q. Where did you ride?
A. I rode on top of the cars.
Q. And you rode up for the purpose of seeing somebody do that?
A. Yes sir.

Q. Did you call his attention to the fact that there was a defective appliance and suggest that he did not have to go in there?

A. I think I had some talk with him.

Q. You rode along on top of that car and said nothing to anybody and just watched a chance to see and report that somebody went in between these cars and did part of that work with his hands, did you?

A. I certainly did.

Q. That is what the United States pays you for, is it?

A. Yes sir.

Q. Now, the next day you went down there early in the morning, did you?

A. Yes sir.

Q. At half past seven, had to get up a little early that morning?

A. Well, I don't know that that was the case, but we got down there a little earlier.

Q. Then you found a couple of coal cars that came over from the other side of the river?

A. Yes sir.

Q. Now, one of these cars I understood you to say had something the matter, that is # 80,263, had something the matter with the chain connecting the link pin or lock block on the B end of the car?

A. Yes sir.

Q. What do you say was the matter with that?

A. The lower clevis was broken as I recollect, without referring to my notes.

Q. Just put in the record what the clevis is?

A. The clevis is the connecting chain with the lock block.

Q. But what particular office does it serve?

A. It serves to make the connection.

Q. It is a kind of a little bolt, isn't it?

A. No, it is rather a link with a bolt through it, a half link with a bolt through it.

40 Q. Now, that was broken, was it?

A. That is my recollection, without referring to my notes.

Q. Now, the particular office of that was what?

A. Was to connect the lock block with the uncoupling lever.

Q. Now, will you explain how with that broken the coupling could remain fastened together, could remain locked?

A. Oh, it could remain locked.

Q. Explain how, please, I want to get at what you know about the office this performed?

A. That has absolutely nothing to do with the coupling part of it, they would couple all right.

Q. Had nothing to do with the uncoupling either, had it?

A. Oh, yes.

Q. Well, what had it?

A. Because the lock block was disconnected with the uncoupling lever, that being broken disconnects the lock block from the uncoupling lever.

Q. Well, what effect does the breaking of that clevis have upon the use of the automatic appliance?

A. It makes it totally and wholly inoperative.
Q. Well, the cars stay together, don't they?
A. It cannot be uncoupled without the necessity of a man going between the cars and raising the lock block in his hands.
Q. How do you know, did you see that done in this case?
A. No, by practical experience.
Q. You didn't watch to see anybody go between these cars?
A. There didn't anybody go between these cars.
Q. How do you know? Didn't you ride on that car out of Gibson?
A. Well, if they had I think I would have seen them.
Q. Didn't you ride on that car out of Gibson?
A. I rode that cut down, yes sir.
Q. But you didn't see this particular car?
A. I don't know that I did, no sir.
Q. Now, there was another car # 86,192 that you have testified to that was in that same cut or train?
A. Yes sir.
Q. Now, this cut—this phase that you use—"cut" is a string of cars that was taken out of that train?
A. Yes, they are usually called a cut, mentioned as a cut or a train or a transfer.
Q. How many were there in this cut or train?
A. Well, I think there were 15 to 25 cars, I would not be certain.
Q. Now, then those two cars that you have testified about were they coupled together, these two coal cars?
A. No sir, I don't think they were.
Q. They were in different parts of the train?
41 A. That is my recollection, I have nothing in my notes——
Q. How many cars did you inspect that morning before half past seven?
A. I can't tell you, I don't know.
Q. Did you inspect more than 30?
A. Oh, I expect I did, perhaps walk down a couple of tracks.
Q. But you didn't see anybody go in between the ends of these two cars?
A. No, I have no record of anybody going between the ends of those cars.
Q. Well, you didn't see anybody, did you?
A. No, I don't think so.
Q. Now, then the coal car you say had a grab iron missing?
A. Yes sir, broken.
Q. And you found that out that morning too, did you?
A. Yes sir.
Q. How many grab irons were missing?
A. One.
Q. And that was at the B end of the car?
A. On the righthand side of it facing the end of the car.
Q. Now, did you see anybody try to make use of that grab iron?
A. No.
Q. Or to climb up the car where that grab iron was?

A. No sir.

Q. The cars when you found them were standing still?

A. Yes sir.

Q. And you don't know where they came from except the marks that you saw on the car as the evidence you had from the direction in which the train was heading and the marks on the cars that was evidence to you as a railroad man where they had come from and where they were going?

A. Yes sir.

Q. Of course you didn't know anything about the condition of that car when you started on that trip, did you?

A. I did not, no sir.

Q. And you are simply describing the condition that you saw there?

A. Just the condition I found.

Q. That was half past seven in the morning; and when did you next see these two cars?

A. I saw them almost continuously from half past seven to eight thirty a. m. when they were placed on this track No. 12.

Q. Now, what time was it that they were moved from Gibson?

A. About 8:50 I think.

Q. 8:50 or 7:50?

A. 7:50.

Q. Then you were with them for about an hour when they were placed upon track No. 12; now you saw a Burlington inspector up there on track No. 12, didn't you?

A. Yes sir.

Q. And he inspected the cars?

A. He inspected them both soon after their arrival.

42 Q. He marked them in bad order?

A. He marked them in bad order, repair track when empty.

Q. Now, the cars were sent to Omaha and were headed for the freight house down there or some place in the yards where they could be unloaded?

A. Yes sir.

Q. The last time you saw them was on this track 12?

A. Yes sir.

Q. What time was it you saw them, that you came in contact with the Burlington inspector?

A. Well, it might have been as late as nine o'clock, 9:30, I don't know just the exact time.

Q. Well, you saw them, didn't you, I thought you said the last you saw of them that morning was about 8:30.

A. I was speaking of the cars, I said the last time I saw—I told you this, that I found these cars at 7:30 a. m. and they were in my sight almost continuously when they were placed on track 12.

Q. Now, at that time you lost sight of them, didn't you?

A. No sir, I saw them after that several times.

Q. How did you come to see them, to follow them up so closely to see what the Burlington people had done to them?

A. Whether the inspection was being made; I also got hold of the——

Q. Are you in the habit of giving direction to the railroad repair crew as to what they shall make repairs on and what they shall do?

A. I have frequently done that, yes sir.

Q. You have assumed to do that, have you?

A. I have not assumed to do it. I simply called their attention to it.

Q. And told them what to do?

A. No sir.

Q. And the Burlington inspector you came in contact with inspected these cars and put this order, this direction, on the cars to your knowledge?

A. He marked them "bad order, repair track when empty."

Q. And that was done as soon as the attention of the inspector was directed to the condition of the car, was it?

A. Well, I can't say that it was done as soon as his attention was directed to it, but shortly afterwards, within a reasonable time.

Redirect examination.

By Mr. WALTER:

Q. And these cars had been marked "bad order, repair track when empty;" do you know whether they were or were not repaired?

A. They were not repaired up to the time I left the Burlington yard.

Q. Do you know whether they ever were repaired?

43 A. No, I don't.

Q. You were asked a moment ago whether you saw anyone attempt to use the broken grab iron on the right hand side of # 86192 to climb the car; what are grab irons used for?

A. They are appliances for the better protection of employees in coupling and uncoupling cars.

Recross-examination.

By Mr. BRECKENRIDGE:

Q. It is a provision for better protection, that is the only purpose, is it, of the grab iron?

A. It is to protect the employé, yes sir.

Q. How will that protect the employé?

A. In every way.

Q. Well, how is one way?

A. Why, when he goes between the cars he has something to grasp to hold to, to make him secure.

Q. They are put there, then, for the purpose of protecting the employés when they go between the cars?

A. Yes sir.

Q. And you didn't see anybody go between the cars?

A. Not in that case.

Q. And you are insisting that this car was defective because some-

body had to go between the ends of the cars, are you, and that the thing which made it possible for them to go between the ends of the cars was gone?

A. I reported the car because it was in a defective condition, the grab irons required were missing.

Q. You stated that you know Gibson to be a repair point, now don't you know that it was not a repair point the 9th of August, 1905?

A. No, I do not.

Q. You do not know whether it was or not at that time?

A. You asked me if I didn't know that it was not a repair point?

Q. Yes.

A. No, my information was that it was a repair point for that class of repairs.

Q. Now don't you know that Gibson became a repair point only since November of last year?

A. No, sir, I don't, know anything about Gibson since August 1905.

Q. You have not been down there since half-past 7 o'clock August 9, 1905?

A. No, August 9, was the time I was there.

The witness excused.

JOHN F. ENSIGN, being first duly sworn, testified as follows:

44 Examined.

By Mr. WALTER:

Q. Where is your residence?

A. Denver, Colorado.

Q. What is your occupation?

A. Inspector safety appliances for the Interstate Commerce Commission.

Q. How long have you held such position?

A. About three years.

Q. Prior to that what was your business?

A. Locomotive engineer.

By Mr. BRECKENRIDGE: I will admit Mr. Ensign's qualifications.

Q. How many years have you been in the railroad service?

A. About twenty years.

Q. What are your duties as an inspector of safety appliances?

A. Inspect railroad equipment as to the condition of safety appliances.

Q. Were you so employed in August, 1905?

A. Yes sir.

Q. Where were you on August 8th and 9th, 1905?

A. In Omaha, Nebraska.

Q. Were you engaged in your duties as inspector?

A. Yes, sir.

Q. Did you on August 8th, 1905, inspect K. C. *S. F.* & M. car #13567, coal car?

A. I inspected some cars but I would rather refer to my book to get the number correct.

Q. Did you at the time this inspection was made, make notes as to what you found?

A. Yes sir.

Q. Were they made at the time?

A. Yes sir.

Q. In your own handwriting?

A. Yes sir.

Q. Have you had them continuously since?

A. Yes, sir.

Q. Were they at the time made correct, accurate and true?

A. Yes, sir.

Q. Are they in the same condition now as when made?

A. Yes, sir.

Q. Have they been in your custody all the time?

A. Yes, sir.

Q. I will ask you then whether you inspected August 8th, 1905, K. C. *S. F.* & M. car # 13567, from your memory as refreshed by your notes, if you find it necessary to so refresh your memory?

A. Yes, sir, I find that I so inspected car #13567, KC*SF*&M.

Q. Where did you first see that car?

A. In the Gibson yard, track #2.

45 Q. Did you examine it as to its couplers on the A end?

A. Yes, sir.

Q. What was their condition?

A. The uncoupling chain was broken.

Q. On which end?

A. On the A end of the car.

Q. What is the office of the chain?

A. It connects the uncoupling lever to the lock block of the coupler.

Q. What is the purpose of the lever?

A. So that a man in cutting one car from another may do so without getting in between the ends of the car.

Q. What does he do to uncouple two cars?

A. Takes hold of the long arm of the lever that hangs down by the end sill which raises the lock block of the coupler permitting the knuckle to open and the cars separate.

Q. If that car is detached from another car and the knuckle closed, what has to be done in order to prepare that car for uncoupling; the knuckle, how is it opened?

A. Usually by taking hold of the uncoupling lever and raising the lock block, throws the knuckle open in most instances.

Q. If it does not have a kick-out proposition as to the knuckle, what has to be done to prepare it?

By Mr. BRECKENRIDGE: Objected to as immaterial, speculative. Overruled and defendant excepts.

A. The knuckle has to be opened by hand.
Q. What is done in order—give the full process.
A. A man will take hold of the uncoupling lever if it is coupled, by one hand, and reach in and take the knuckle by the other and open it at the same time.
Q. If the lever is disconnected from the lock pin or lock block, how is the car uncoupled by the use of the mechanism on the particular car?
A. By raising the lock pin by hand.
Q. Where does the man stand to do this?
A. Between the ends of the cars, or by the side of the coupler at the end of the car.
Q. Did you see this car, #13567, moved?
A. Yes, sir.
Q. Where was it moved from, or to?
A. It was moved from the Gibson yard to the Omaha yards.
Q. By whose engine?
A. Chicago, Burlington & Quincy.
Q. Did you see this coupler again?
A. Yes, sir.
Q. Where?
A. In the Omaha yards.
Q. Was it in the same condition as when you inspected it in the Gibson yards?
A. It was.
Q. What was done with that car?
A. I will have to refer to my notes.
Q. Very well.
46 A. It was delivered to the Chicago & Northwestern Railway Company.
Q. By whom?
A. By the Chicago, Burlington & Quincy.
Q. What was done with it?
A. It was set on the Chicago Northwestern receiving track.
Q. Go ahead and state just what you saw.
A. It was there left by the Chicago, Burlington & Quincy, and the Chicago & Northwestern inspector inspected the car and carded it back to the Chicago, Burlington & Quincy for defective safety appliances.
Q. What else was done with the car?

By Mr. BRECKENRIDGE: The defendant moves to strike the answer of the witness, that part of the answer beginning with the words "carded it back," as not the best evidence, hearsay, immaterial.
Objection sustained.

Q. Did you see any card placed on the car?
A. Yes, sir.
Q. Did you read that card?
A. I did.
Q. What was on the card?

By Mr. BRECKENRIDGE: Objected to as immaterial, incompetent, not the best evidence.

Sustained and plaintiff excepts.

Q. Was that car taken back?

By Mr. BRECKENRIDGE:

Q. To where?

By Mr. WALTER:

Q. To the Burlington?

A. Not to my recollection.

By Mr. BRECKENRIDGE: I move to strike the answer as incompetent.

Q. Did you see the car taken back?

A. No, sir.

Q. Where did you last see the car?

A. On the Chicago, Northwestern transfer track.

Q. Did you see any man use the uncoupling——

By Mr. BRECKENRIDGE: Don't lead your witness.

Q. Was this car or not # 13567, uncoupled from any car to which it was attached so far as you know personally?

A. Yes, sir.

Q. Where?

A. In the lower yard, what is known as the lower yard, Chicago, Burlington & Quincy.

47 Q. State how it was uncoupled.

A. By one of the Chicago, Burlington & Quincy brakemen going between that car and #6704.

Q. Did you ascertain his name?

A. No, sir, I did not.

Q. Was that car moved alone or with other cars from the Gibson yards by the Burlington?

A. With other cars.

Q. About how many?

A. I couldn't say, there were several, I did not count the cars or make any record of the number, there were several cars in the cut of cars that came from Gibson.

Q. Did you on August 9th, 1905, inspect Chicago, Burlington & Quincy coal car #80263?

A. Yes sir.

Q. Where was that car?

A. It was in the Gibson yard of the Chicago, Burlington & Quincy Railroad Company.

Q. Did you inspect it as to its coupling mechanism on the B end or the A end, either?

A. Yes, sir, both ends.

Q. What did you find on the B end?

A. The lower clevis was broken, the uncoupling chain.

Q. Was the lever connected to the lock block?

A. No, sir.
Q. What is the office of the lower clevis?
A. Connects the uncoupling chain to the top of the lock block.
Q. Is there another clevis?
A. Yes, sir.
Q. What is its office?
A. Connects the top of the chain to the uncoupling lever.
Q. If order to operate this particular coupler, what must be done?
A. A man would have to go between the ends of the cars in order to uncouple it and raise the lock block by hand.
Q. Did you see that car moved?
A. Yes, sir.
Q. What was done with it?
A. It was hauled from the Gibson yard to the Omaha yards near the freight house.
Q. Did you inspect that coupler after it arrived in the upper yard?
A. Yes, sir.
Q. In what condition was it?
A. Same position as when first inspected in Gibson.
Q. What was done with the car when it arrived in the Douglas street yard?
A. It was delivered on one of the tracks near the freight house yards for a coal company.
Q. Was it in the same condition then as when you last saw it?
A. Yes, sir.
Q. Did you inspect on August 9th, 1905, C. B. & Q. coal car #86192?
A. Yes, sir.
48 Q. When did you first see that car?
A. In the Gibson yard.
Q. Did you inspect it as to its grab irons?
A. Yes, sir.
Q. What did you find on the B end?
A. One missing grab iron.
Q. State the condition of the car as you saw it, that end?
A. The grab iron had evidently been broken, the eyes of the end, that it, where the lag screw fastens it to the end sill of car, was still remaining on the end sill of the car.
Q. Was there anything there which would serve as a grab iron or hand hold?

By Mr. BRECKENRIDGE: Objected to as immaterial.
Overruled and defendant excepts.

A. No, sir, nothing.
Q. Did you see that car moved?
A. Yes, sir.
Q. Where was it taken?
A. To the Omaha yard.
Q. Did you go with that car?
A. Yes, sir.

Q. Was it in a cut of cars or alone?
A. Cut of cars.
Q. Did you inspect it after it reached the Douglas street yard?
A. I did.
Q. What was its condition?
A. The same as when first inspected in the Gibson yard.
Q. Where was it placed?
A. On the same track as the other one, track 12, I think, of the freight house yard for some coal company.
Q. What is the purpose of a grab iron at the place you describe this as to be missing?
A. The better to provide for a man's safety in case he has to go between the cars.
Q. Is coupling and uncoupling made when cars are standing still or when they are in motion?
A. In motion, usually.

Cross-examination.

By Mr. BRECKENRIDGE:

Q. Well you didn't see anybody try to couple or uncouple this car when it was in motion or standing still?
A. Not at the time.
Q. Did you see either one of these cars that you inspected that morning?
A. Yes, sir, I saw one of them.
Q. Which one of them?
A. #13567.
Q. Well that was the morning before?
A. That was the morning prior, that is right; no sir, neither one of these cars.
Q. Will you kindly explain to me how a grab iron could be defective or useful on that side of the car on which this was placed?
A. Yes, sir, I think I can.
49 Q. Well how?
A. By using the model I think I can explain it fully to you.
Q. Well these models are not in evidence, can't you tell me without reference to the models?
A. I think so; in case that a man should be switching from the opposite side of the locomotive, that is, in case the switchman should be standing on the opposite side of a train of cars from where the engineer is located, in switching a car in that direction he would have to take hold of that grab iron.
Q. If he was going to take hold of a grab iron on the opposite side of a car from where he was expected to do it, that grab iron might be valuable?
A. He has to do that sometimes in a curvature of the yard where he cannot get a signal from the engineer.
Q. So that that grab iron on that side of the car is put on as a matter to serve an extraordinary and unusual use, isn't it?
A. I would not consider it so, no sir.

Q. Well, it is not a usual thing to use a grab iron on that side of the car, is it?

A. Yes, sir.

Q. Well, where is the lever?

A. It is on the opposite side.

Q. How is a fellow going to reach over the car with his hand on this grab iron and reach on the other side of the car and take hold of the lever?

A. There are as many movements made from the side where the switchman is working as there are on the other side, due to the curvature in the yards.

Q. Did you see any yards with curvatures down there at this time?

A. I saw the track with curvature.

Q. And did you see anybody trying to use the grab iron on this side?

A. No, sir.

Q. You say it had evidently been broken?

A. Yes, sir.

Q. You don't know when it was broken?

A. No, sir, but from appearances it was a very old defect.

By Mr. BRECKENRIDGE: I move to strike the answer beginning with "from appearances," as not responsive and immaterial.

Overruled. Plaintiff excepts.

Q. Now as to this coupler on the B end?

A. Which car is that, please?

Q. Well we are describing #86192, now, as to the coupler appliance?

A. We have gotten through with this car #13567.

50 Q. I am going back to this other thing for a moment; just describe the appearance that you say made that look old to you?

A. Well, sir, they were completely rusted off, from appearances it had been that way for months.

Q. Do you know whether there had been any rains that night?

A. I do not.

Q. You don't know a thing about that?

A. I cannot recollect, no, sir.

Q. Did you examine both ends of the car?

A. Yes, sir.

Q. Take a photograph of them?

A. No, sir

Q. You didn't?

A. No, sir.

Q. How long were you examining that car?

A. Oh, at different times probably put in fifteen or twenty minutes at it.

Q. Took you all that time to look at these two ends of these eyes on this grab iron.

A. To fully satisfy myself, yes, sir.

Q. And it took all that time to satisfy you that it was an old break?

A. No, but I wanted to be absolutely sure.

Q. It took you all that time to satisfy yourself that it was an old break, did it?

A. Yes, sir.

Q. Now with reference to the other car that you saw that morning, 80263, there are two clevises, are there?

A. Usually, yes, sir.

Q. That is, if this particular appliance has been completed?

A. There were two clevises in this instance.

Q. And one of them was broken?

A. Yes, sir.

Q. Where was it broken?

A. Right, very near the center of the clevis.

Q. Did you go in there and take it out?

A. Didn't take it out, I went in and looked at it.

Q. You went in between the cars to look at it?

A. I certainly did.

Q. Could you see where the break was?

A. Yes, sir.

Q. Into what did this clevis go?

A. It was connected to the top of the lock block.

Q. Did this clevis go into anything?

A. Yes, it was fastened to the top of the lock block.

Q. And where is the top of the lock block?

A. Right on top of the coupler, that pin that goes down into the coupler.

Q. Now you are not looking at Mr. Goss?

A. No, I am not looking at anything but the car.

By Mr. BRECKENRIDGE: That is what I object to, I insist that either the models shall be offered that we may have a record here or else that the witness shall not refer to the models.

51 By Mr. Goss: We offered to move them a moment ago, we will do so now if you wish.

By the COURT: If counsel on either side desire the models removed from the room, they may be removed.

By Mr. BRECKENRIDGE: Well we will see, we may want to use them ourselves. You will not consent that these be put in evidence.

By Mr. WALTER: No, we would rather not.

A. The top of the lock block is that part made expressly to have connection with the chain, there is an eye in the top of the lock block, a pin going down in for the purpose of keeping the knuckle intact when the coupler is closed.

Q. You got down there early that morning didn't you, half past seven?

A. I am an early riser, yes, sir.

Q. And rode these cars back up to Omaha in about an hour? These were the two cars that you had in your eye all the time?

A. Pretty nearly all the time, yes, sir.

Q. And these were the two that you picked out in that train that morning to report on?

A. Yes, sir.

Q. How many cars did you inspect that morning?

A. I could not tell you, we went over several.

Q. Fifty or seventy-five?

A. Oh, no, I don't think that long because these cars moved shortly after we got down there; these were among the first that we come across.

Q. They didn't stop the operation of the road so you could inspect the cars?

A. No, not at all, neither did we.

Q. You got back up to the Douglas street yards about half past 8?

A. About that, yes, sir.

Q. And these cars were switched to the premises of the coal company to which they were consigned?

A. Yes, sir, that was my understanding.

Q. And then that was the only move from Gibson to the premises of the coal company to which they were intended to go?

A. Yes sir.

Q. And did you see any inspector, any Burlington inspector there, at the Omaha yards?

A. Yes, sir.

Q. And you saw him inspecting those cars?

A. Not 'til after his attention was called to it.

Q. You called his attention to it?

A. Yes, sir.

Q. Did you or Mr. Wright do that friendly office?

A. Well we were together, I think Mr. Wright did the talking.

Q. You knew he was a Burlington inspector?

A. Yes, sir.

52 Q. Did you see any direction that he put on the cars with respect to the repairing?

A. Yes, sir, I think so.

Q. What?

A. He carded the car "bad order, repair when empty."

Q. He wrote that on the cars, did he?

A. Yes, sir.

Q. Now that was done at the point where the cars were unloaded?

A. No, sir, well on the same track.

Q. At the premises where the cars were to be unloaded?

A. Yes, sir, but switching would have to be done to get them where they could be unloaded, they would have to move other cars——

Q. That is, they would have to move other cars?

A. Yes, sir, have to set out empties and——

Q. Now don't fence with me; these two cars as I understand were stopped when they were moved from Gibson, they were stopped on the premises of the companies to which they were consigned for the purpose of being unloaded?

A. Yes, sir.

Q. But in order to unload them other cars would have to be gotten out of the way so that these two cars could be shoved up to the bins to be unloaded.

A. Yes, sir.

Q. And there at that place the Burlington inspector carded the cars either upon your suggestion or some other, and marked them in bad order and directed repairs to be made?

A. Yes, sir, after we had shown him the defect.

By Mr. WALTER:

Q. Mr. Ensign were these defects such as required taking them to a repair track, or could they be made where the cars stood?

By Mr. BRECKENRIDGE: Objected to as immaterial, irrelevant.

By the COURT: I think you had better describe the condition they were in and what repairs were necessary rather than calling for a conclusion.

By Mr. WALTER: Well, we will withdraw the question.

The Witness excused.

JOB H. STRICKLAND, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Examined.

By Mr. WALTER:

Q. Where is your home?

A. Proctor, Minnesota.

Q. What is your occupation?

53 A. Safety appliance inspector for the Interstate Commerce Commission.

Q. How long have you had that position?

A. About three years.

Q. Prior to that what was your business?

By Mr. BRECKENRIDGE: Objected to as immaterial, irrelevant. I suppose we may admit the qualifications of any of these gentlemen.

Objection overruled and defendant excepts.

A. I was railway employé.

Q. How long?

A. About eighteen, twenty years.

Q. In what capacity?

A. As brakeman, conductor, airbrake instructor, and road foreman of engines.

Q. With what roads?

A. Santa Fe, Illinois Central, Great Northern, Duluth & Southern.

Q. As safety appliance inspector, what are your duties?

By Mr. BRECKENRIDGE: Objected to as immaterial——

Overruled and defendant excepts.

A. I go to the different railroads, inspect their equipment look to see the condition of the safety appliances.

Q. After you make an inspection, what do you do?

A. Report all the conditions that I find them in.

Q. To whom?

A. To the Interstate Commerce Commission.

Q. As inspector of safety appliances, where were you on or about January 26, 1906?

A. Seneca, Nebraska.

Q. Did you there inspect Northern Pacific car # 5764?

A. I did.

Q. You made notes at the time?

A. Yes, sir.

Q. Made in your own handwriting?

A. Yes, sir.

Q. Were they true and accurate as made?

A. Yes, sir.

Q. Have they been in your custody ever since?

A. Yes, sir.

Q. Have there been any changes made in them?

A. No changes.

Q. Are you able to testify without reference to your notes to refresh your memory in all features pertaining to your inspection?

A. Not all features.

Q. Where did you first see box car #5764?

A. On track #4 at Seneca, Nebraska.

Q. Was it in a train?

A. Yes, sir.

Q. What was on the front of the train?

A. Chicago, Burlington & Quincy locomotive.

54 Q. Do you remember its number?

A. #1740.

Q. What was in the rear of the train?

A. Caboose.

Q. Were there signals out?

A. Yes, sir.

Q. What do these signals indicate?

By Mr. BRECKENRIDGE: Objected to as immaterial.

Overruled, defendant excepts.

Q. What was the condition of that car as to its coupling and uncoupling mechanism on the A end of the car?

By Mr. BRECKENRIDGE: Objected to as immaterial, irrelevant; under the stipulation of facts, and under the statement of the counsel this car was not being used in Interstate Commerce, and the only claim is that it was moved in a train which contained other cars that were actually engaged in Interstate Commerce.

Overruled.

Defendant excepts.

A. The top clevis was missing.

Q. What is the top clevis?

A. The U shaped piece of metal with a hole in both ends of it for a pin to be inserted into.

Q. What does it fasten to at top, and what below?

A. Connects the chain to the lock block of the coupler and the lever of the uncoupling mechanism.

Q. Was it the top end of the chain or the bottom end of the chain?

A. Top.

Q. In order to use the mechanism on that particular car, what had to be done?

A. A man would have to go between the ends of the cars, or in front of the car to reach the lock chain.

Q. What would he then do to uncouple it?

A. He would have to raise it up with his hand.

Q. If it was closed and that clevis missing, the knuckle was closed, what would have to be done to prepare that coupler for coupling?

A. That type of coupling if he could raise hard enough on it it would open the coupler, but not having power enough he would have to take hold of the lever with one hand and the chain with the other.

Q. Would he have to be between the ends of the cars?

A. Undoubtedly.

Q. When did you next see that car?

A. Alliance, Nebraska.

Q. Where is Alliance from Seneca?

A. About a hundred miles northwest from Seneca.

Q. Did you inspect that car as to its couplers at Alliance?

A. Yes, sir.

Q. What did you find?

55 A. Found it in exactly the same condition as it was at Seneca.

Q. When was it you saw it at Alliance?

A. About between 6:30, somewhere about 6:40 in the morning, the 27th.

Q. The same day?

A. The next day.

Cross-examined.

By Mr. BRECKENRIDGE:

Q. This car was coupled up with other cars, was it?

A. Yes sir.

Q. So far as you know there was no occasion in moving the car from Seneca to Alliance, either to couple or uncouple it from the car to which it was coupled?

A. I don't know.

Q. Did you notice the car to which it was attached at Seneca?

A. I don't remember.

Q. Did you notice what car it was attached to at Alliance?

A. No, sir.

Q. So far as you know when you saw it at Alliance, it was coupled to the same car to which it was coupled when you saw it at Seneca?

A. As far as I know, yes, sir.

Q. And there had not been any occasion for anybody to go in there then?
A. I don't know.
Q. This was an empty car, wasn't it?
A. Yes, sir.
Q. You know that because you went into it?
A. Looked into it, yes, sir.
Q. These things which you say were out of order were what is otherwise known as pin lifters, were they?
A. Well, they are pin lifters or lock block lifters.
Q. Well that is what it was that was out of repair?
A. The clevis was missing to the pin lifter or lock block.
Q. This was in January?
A. Yes, sir.
Q. You got up at 6:40 the next morning to go and look at the car, did you?
A. We got up pretty early, yes, sir.
Q. It is pretty chilly up there, isn't it, that early in the morning?
A. Yes, sir, a little chilly.
Q. Nevertheless you got up and looked this car over?
A. We are accustomed to that, yes sir.
Q. And found it the same as when you looked it over the day before?
A. Yes, sir.
Q. You didn't ride up inside that car, did you?
A. No sir.

By Mr. WALTER:

Q. What is the pin lifter?
A. The pin lifter proper would be the lever really, in fact.
Q. What is the pin chain?
A. That is the chain connecting the lever to the pin or lock block.
56 Q. When cars are coupled in trains, do the same employés or not handle the entire train, all the cars in the train?

By Mr. BRECKENRIDGE: Objected to as immaterial, irrelevant. Overruled and defendant excepts.

A. Yes, sir.

The witness excused.

C. F. MERRILL, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. WALTER:

Q. What is your residence?
A. Waukesha, Wisconsin.
Q. What is your occupation?
A. Inspector of safety appliances for the Interstate Commerce Commission.

Q. How long have you held such position?
A. Five years.
Q. What were you doing prior to that time?
A. Brakeman and conductor.
Q. How many years?
A. Eighteen years.
Q. With what road?
A. Chicago and Northwestern, and Wisconsin Central.
Q. What are your duties as inspector of safety appliances?
A. To go into the yards and inspect the equipments in the different railroads as pertaining to the safety appliances.
Q. Does that include couplers and grab irons?
A. Yes sir.
Q. Where were you about January 26th, 1906?
A. Seneca, Nebraska.
Q. Did you inspect Northern Pacific box car, 5764?
A. Yes, sir.
Q. As to couplers?
A. Yes, sir.
Q. What did you find?

By Mr. BRECKENRIDGE: Defendant objects as immaterial, incompetent; under the issues in this case, and the statement of facts made by the counsel for the Government, this car was not being used in Interstate traffic.
Overruled and defendant excepts.

A. Well I would have to refresh my memory from my notes.
Q. Were those notes made at the time.
A. Yes, sir.
Q. In your own handwriting?
A. Yes, sir.
Q. Were they true and accurate at the time?
A. Yes, sir.
Q. Have you had them continuously since?
A. Yes, sir.
Q. Are they in the same condition as when made?
A. Yes, sir.
57 Q. Did you inspect Northern Pacific box car #5764 on that date?
A. Yes, sir.
Q. What did you find as to the couplers on the A end?
A. Clevis gone on A end; lower coupler.
Q. What is the purpose of the clevis?
A. Connects the lock block chain on the tower coupler to the lever.
Q. Was it at the upper or lower end of the chain?
A. Upper clevis, top.
Q. Was that clevis there?
A. No, sir.
Q. Was the lever connected or disconnected from the chain?
A. The lever was disconnected because there was nothing there, the missing part was gone.

Q. Where did you see that car?
A. On the side track at Seneca, Nebraska.
Q. Was it in a train?
A. Yes, sir.
Q. What was in the front end of the train?
A. Locomotive.
Q. And the rear?
A. Caboose.
Q. Where did you next see that car?
A. At Alliance, Nebraska, January 27th.
Q. What condition was it in as to couplers, if you know?
A. In the same condition as when seen at Seneca.

Cross-examination.

By Mr. BRECKENRIDGE:

Q. And did you get up at 6:40 in the morning to go with Mr. Strickland to see it?
A. Yes, sir, I got up between 5 and 6.
Q. Got up just to take a little exercise before breakfast?
A. Yes, sir.
Q. Now, Mr. Merrill, I understood you to say that you could not see the missing part of this clevis?
A. I could not see it, no, sir.
Q. Well what part of it could you see?
A. Couldn't see any of it.
Q. It was all gone?
A. It was all gone, yes, sir.
Q. Were the two cars coupled up together, hooked up?
A. Yes, sir.
Q. The particular office that this missing business would serve, was in the uncoupling, wasn't it?
A. Yes, sir.
Q. Well so far as you know, they didn't need it, did they? You didn't see the car uncoupled during that night or the next morning?
A. No, sir.
Q. And so far as you know, when you saw it the next morning, it was coupled to the same car it was the night before?
A. I couldn't say because I don't know the car it was coupled to.
58 Q. I wish you would give me just a little bit more—you say that the car in the absence of this clevis could not have been coupled by impact?
A. Well, not if it was in the condition——
Q. Would this particular defect have any effect upon the apparatus so far as coupling the car automatically was concerned?
A. Yes, sir.
Q. How would it prevent it from coupling automatically?
A. Because you would have to open the knuckle before it could be coupled on to another car; you will have to have the knuckle open before you could couple it on to another car.

Q. And what was the particular office of this missing clevis?
A. Well, no way of operating the lock block on this coupler without a man going between the ends of the car to raise it up.
Q. How do you know?
A. Because the top clevis was gone that connected it to the lever.
Q. But how do you know that the car was not coupled automatically?
A. I didn's see it coupled; didn't see it used at all.
Q. And do these clevises wear out and get broken?
A. Yes, sir.
Q. And they sometimes get broken when the train is in motion, don't they?
A. I never saw any break while the train was in motion.
Q. When did you ever see any break?
A. Never saw them break.
Q. The only time your attention was called to them was when they were broken or when they were not broken?
A. Yes sir.
Q. And what makes them break?
A. Well there are several reasons, I suppose, that could be told why they break.
Q. The movement of the train would have that effect, might it not?
A. Well yes, I suppose it could, but as a rule it is poor material or the using of the lever trying to operate the lock block will break it.
Q. Did you examine the material of this clevis?
A. Well, there wasn't any clevis there, couldn't use it.
Q. I understood Mr. Strickland to say that this was broken in two.
A. No, sir—I don't know what Mr. Strickland said.
Q. Then you have no way of telling when an appliance of this kind or how with reference to the movement of the train, it might be broken?
A. No, sir.
59 Q. Your experience don't tell you anything about that?
A. No, sir.

The Witness Excused.

The Plaintiffs rest.

By Mr. BRECKENRIDGE: The defendant moves the court to direct the jury to return a verdict in its favor on the second and third counts of case 31-O, and of 88-O, for the following reasons:

The testimony shows that as to the two cars involved in the second and third counts of 31-O, that the movement of the car after the alleged defects were discovered by the inspector was merely from Gibson to the point in the Omaha yards to which the cars were consigned, and so far as the testimony shows there was neither coupling or uncoupling done, and without any proof except the mere understanding of the witness Wright that such repairs as he found the cars needed might be made at Gibson, but the evidence shows that the cars were inspected at the Omaha yards and carded in bad order, to be repaired when empty."

And for the reason, as to 88-O, that the proof does not show that the car described was being used in Interstate traffic and the claim of the Government being that the fact that this car was being moved in a train which had in it other cars being transported from Nebraska to a point outside the state, confers jurisdiction over the particular car, in the application of the Federal statute. I insist, if your Honor please, that as to counts two and three of the first suit that the evidence of Mr. Ensign showing the movement of these cars, the two coal cars from Gibson to the yard in Omaha, and on the track where they were to be unloaded, in connection with the other testimony, shows that this whole network of tracks down here is for the mere distribution of the cars as they come in from Gibson; that that is not a movement of the cars, even defective, which justifies the application of this statute, and which this penalty is to be collected for; and I insist that as to 88-O that the Federal statute does not apply to a car which is being moved at some point within the state of Nebraska, though there may be in the train cars which are transporting Interstate merchandise.

These, in brief, are my points on those three counts.

By the COURT: I will overrule your motion at this time.

To which ruling defendant excepts.

By Mr. WALTER: If your Honor please we should like to have the inspectors sit by us so we many consult with them.

60 By the COURT: Very well.

JOHN FREYTAG, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. BRECKENRIDGE:

Q. Mr. Freytag, how old are you?
A. 60 years old.
Q. Where do you live?
A. Creston, Iowa.
Q. How long have you lived there?
A. Thirty-seven years.
Q. What is your business?
A. Foreman of car inspectors at Creston.
Q. For what company?
A. Chicago, Burlington & Quincy.
Q. And how long have you been engaged in that business?
A. Thirty-seven years at Creston.
Q. And have you had experience before?
A. I was at Burlington for three years.
Q. Now whose business is it to inspect cars that go through Creston?
A. Well I got four inspectors on duty, that is, they do the inspecting.
Q. Do you, yourself, make inspections of cars?
A. I do some, when the trains arrive, but generally I go through the yards and if there is anything which needs attention——

Q. Your duties are more in the direction of superintending the repairs, are they?

A. Yes, I am looking after that the work is done.

Q. You are the foreman, in other words, of the inspection and repair crew?

A. Yes, that is, light repairs in the yard.

Q. Such as can be made in the yards?

A. Yes.

Q. Now what examination is made in the yards at Creston of freight cars going through towards the west?

A. Well, we inspect them for the safe running, so the cars are safe to haul, to run.

Q. And what inspection do you make of the coupling apparatus?

A. Well we make inspection of that also, and if we find any of these small articles like a lifting clevis, and pins, we will make the repairs right there in the yard.

Q. At Creston?

A. Yes, sir.

Q. You have some repair shops at Creston?

A. Yes, sir.

Q. And you keep on hand a supply of repairs?

A. Oh, yes, keep all these, I got two places in the yards, one at each end of the yard, to make it a little more handy for them small supplies.

Q. Now are all the cars examined?

61 A. Every car is inspected that comes in the yard, on its arrival.

Q. Now were you in charge of the inspection, the work of inspecting over there, we will say from the 1st to the 5th or 8th or 9th of August, 1905?

A. I was.

Q. And were you personally seeing to it that the work of inspecting was being done?

A. Well, yes, I am, I am there from 7 o'clock to 6 o'clock in the evening, and I got a foreman at night.

Q. Now what is the practice or custom in that yard about making entries, or about making the record of defective cars?

A. Why we keep no record of defective cars except what needs repairs, we mark them "bad order" and set them over to what we call the "rip" track.

Q. But don't you have a book in which you put the number of the cars that are marked in bad order, or needing repairs?

A. No, we use chalk and cards both.

Q. But you have some record, don't you, of the cars that go through that need repairing?

A. The shop does that, they keep a record of every car that comes over there on the rip track where they make repairs, they take the number when the car gets on the rip track and when it leaves the rip track.

Q. What do you m-an by the rip track?

A. That is the repair track.

Q. Mr. Freytag, I show you a book here which I will have identified a little later, and ask you what that book is?

A. That is the car shop record of cars repaired; it is all there when they go into the shop and when they went out.

Q. Now then as to all other cars that don't go to the shop and are not repaired there, they are carded are they, "bad order?"

A. Carded "bad order", and sent over to the shop.

Q. And then all cars that do not go into the shop that need repairs are repaired right on the track there?

A. Yes, right on the track.

Q. That is, small repairs that can be made *on* a very few minutes?

A. Yes, sir.

Q. You have no personal recollection, Mr. Freytag, have you, of two coal cars, #86192 and #80263?

A. I haven't, no.

Q. And if those cars had been repaired by you, or by anybody else in that yard, the repair would either have been put on on the track or else sent to the shop?

A. Yes, if they were repaired at the shop the shop would have a record; if they were repaired in the yard, I never keep no record in writing *or* these little clevice and clevis pins.

Q. But the custom and practice of your crew there is to make those repairs where they are needed and to inspect all cars?

A. Yes, immediately, at Creston.

62 Q. Now where is the next repair point this side of Creston?

A. That is at Omaha.

Cross-examination.

By Mr. WALTER:

Q. You have been forty years in the railroad business?

A. Forty-two.

Q. And you have four men over there?

A. I got four men in the daytime and four at night to do inspecting.

Q. It is customery to repair couplers when the clevis is missing or part of the chain right where the car stands, isn't it?

A. That is what we do.

Q. The men carry the material either in their pockets or in a bag?

A. Well no they go after the material, I say I got a place where we keep the material on each end of the yard.

Q. You inspect the cars when they come in?

A. Yes.

Q. Are they switched about in the yard?

A. They are switched some and part of the trains are not switched very much.

Q. Do you inspect them again before they go out?

A. Well we have a man to go along when the train is made up.

Q. Does he inspect their condition as to couplers and grab irons?

A. Yes, and for air, also.

Q. Well does he devote his time practically to the air and the

condition of doors on the cars and wheels, particularly, or does he look at everything?

A. He looks really at everything.

Q. Now how many cars a day passed through Creston—did you have these four men day and four night last August?

A. Yes.

Q. August, 1905?

A. Yes.

Q. You still have these four men day four night?

A. Yes.

Q. Now how many cars during the day went through Creston?

A. Well we got from—I couldn't say really—from three to four hundred every twenty-four hours.

Q. Those cars were thoroughly inspected as to everything, both going in and going out?

A. Yes, sir.

Q. So that they inspected—from six to eight hundred cars were inspected during the day, each car would be inspected twice?

A. Well, of course if you count them double.

Q. They were each inspected twice?

A. Of course they are not really, I wouldn't say they go through the inspection when they go out as they do when they come in.

63 Q. Now what difference in the inspection in and the inspection out?

A. Well now you take for instance the wheel inspection, of course that will be a good deal different.

Q. Going out?

A. Yes, going out; of course they would be thoroughly inspected coming in, and so we look over the doors and anything of that sort, of course they are not as liable to get so much out of order right there in the yard especially on trains—there are a good many trains but very little handled.

Q. Now, what particular defects are liable to occur in the yard in switching?

A. Pull the grab irons out occasionally?

Q. The couplers?

A. Yes.

Q. The pin chain or pin lifter might become injured?

A. Well, we do not find very often that——

Q. That does occur in shifting about in the yard?

A. Well, of course we don't stand right along side of them and switch them but you don't find but very few of them broken in the yard.

Q. Now, you don't make as careful inspection, as I understand it going out as you do when the cars come in?

A. I have one man along the train looking over it when it is made up.

Q. Do you have any trouble with these men about performing their duties?

A. No.

Q. Do they ever overlook any defects?

A. Well, not very much; they ain't no person living can say that he is perfect.

Q. Now, how far are you from Omaha?

A. One hundred miles.

Q. And for a hundred miles there is no inspection of equipment?

A. No.

Q. Now, for all you know those cars may have been defective at Creston and be overlooked.

By Mr. BRECKENRIDGE: Objected to as not proper cross-examination. Overruled and plaintiff excepts.

A. I won't say that, the cars are all right at Creston to the best of my knowledge.

Q. Well, do you know they are all right?

A. To the best of my knowledge I can't say that just them two particular cars was something wrong with.

Q. Have you any information at all about those cars?

A. Not these two, no; I got that much, that every car is inspected and should not go out until it is repaired.

Q. Now, did these go through Creston day or night?

A. I could not say, what time they did go through there.

64 Q. They might have gone through in the night, under the night foreman's charge, might they not?

A. I say I haven't got any book of record of those particular cars.

Q. Then isn't this true, Mr. Freytag, you know nothing about these two particular cars?

By Mr. BRECKENRIDGE: Objected to as not fair to the witness, incompetent, irrelevant and immaterial, argumentative. Sustained and plaintiff excepts.

Q. Do you have any personal knowledge at all of these two cars?

A. I have not.

Witness Excused.

Adjournment was here taken to 2:00 o'clock p. m. October 4, 1907.

2:00 o'clock p. m. October 4, 1907. Pursuant to adjournment the following proceedings were had:

B. F. TURNER, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. BRECKENRIDGE:

Q. Where do you reside?

A. #1234 Park Wilde Avenue, Omaha.

Q. How long have you lived in Omaha?

A. A little over twenty years.

Q. What is your business?

A. General car foreman for the Burlington here.
Q. How long have you been engaged in that capacity?
A. A little over twenty years.
Q. What do you do as the general foreman of car repairers for the Burlington system here?
A. Well, I have charge of all inspections, car inspections both in Omaha and South Omaha.
Q. Where are repairs on freight cars made, that is, that are made under your supervision and direction?
A. At present they are made at Gibson.
Q. And how long have they been made at Gibson?
A. The 10th of last November, 1906, we moved our car repair tracks there.
Q. Prior to that where were they made?
A. Down in what they call the Douglas street yards.
Q. How far is Gibson from the Douglas street yards?
A. Well, our repair track at that time run almost to the Douglas street crossing.
Q. That is, the repair track in the Douglas street yard?
65 A. Yes, sir.
Q. Went to what crossing?
A. The Douglas street.
Q. Up north?
A. The Douglas street bridge.
Q. How far is the Gibson Station or yard from the Douglas street yard?
A. A mile and a half or mile and three-quarters.
Q. In August, 1905, what disposition was made of the cars coming into Gibson?
A. Well, the cars coming to South Omaha were switched at Gibson and the cars going to our connection on the inside yard were taken from Gibson to the Douglas street yard.
Q. That was simply a junction point and switching point?
A. Yes.
Q. Now, do you recall—have you any personal knowledge of repairs that were put upon two cars, two coal cars, C. B. & Q. coal cars one numbered 80,263 and the other 86,192, in August, 1905?
A. I have a record of those repairs, yes sir.
Q. Have you any personal knowledge of that matter?
A. No sir.
Q. Did you have at the time any direct notice from either of the government inspectors of the defects upon those cars?
A. No sir.
Q. Does your record show when the repairs were made and what they were?
A. No sir.
Q. Does your record show where the cars were when the repairs were made to them?
A. No, it don't show what track they were repaired on.
Q. Does it show the time when the cars were repaired, the date?
A. The day.

Q. Now, examine your record with reference to the repairs on those two cars and see what it shows; First, before you turn to the entry that I am asking you for, who made the entries in that record?

A. The man that makes the repairs.

Q. And are the entries made at the time the repairs are made or near that time?

A. Near that time; he posted up these books the same day they did the repairs.

By Mr. BRECKENRIDGE: The production of these books is within our stipulation.

By Mr. WALTER: We agree that the records were made in the ordinary course of business.

Q. Now, turn to the records of repairs on these two cars August 9, 1905?

66 A. Well, my record shows here August 9, 1905.

Q. And with what respect to what car now?

A. Repairs on 86,192.

Q. What were the repairs on 86,192?

A. One end grab iron, two release rods.

Q. Now, that is August 9, 1905, those repairs were made?

A. Yes sir.

Q. Now, with respect to the other car 80,263, what will that record show?

A. One pin chain clevis and two end grab irons.

Q. Where is there another repair station on freight cars coming in from the East, that is, where is the first repair station east of Omaha as it was located in August, 1905?

A. We have our general shops at Plattsmouth but the trains are not switched out there, they just come right on through.

Q. Well, I am asking about repair shops?

A. That would be Creston, the next repair station east.

Cross-examination.

By Mr. WALTER:

Q. What is that book?

A. This is a record of repairs made to cars.

Q. Now the man that makes those repairs, does he put these right in the book while he is out in the yard?

A. No sir, the man that made the repairs took them on a little memorandum book, takes his book into the office and copies them in this book.

Q. The man that makes the repairs copies them from an original slip into that book?

A. Yes sir.

Q. You have nothing to show there where those cars were when they were repaired?

A. No, sir.

Q. Now, who first told you about those two cars?

A. Well, I could not recollect that.

Q. Didn't Mr. Spiking call you up over the phone and tell you that the government inspectors has found these two cars and ask you to come over and see about it?

A. Not that I recollect.

Q. Did he call you up over the phone?

A. Now, he may have, I could not recollect.

Q. Where were you on that day when you first heard of these two cars?

By Mr. BRECKENRIDGE: Objected to as assuming.

Q. Who first told you about these two cars on that day?

A. Well, I would not say whether it was that day or it might have been a day or two afterwards, I seen this foreman Spiking every day.

67 Q. Didn't you come over into the Douglas St. yard and see these cars yourself before they were repaired?

A. No sir.

Q. Did you see these cars over there?

A. Not that I know of.

Q. Do you remember when the government inspectors were there?

A. Yes sir.

Q. Now, what day was that?

A. Well, I couldn't say.

Q. Wasn't that the very same day that these two cars were repaired, August 9th.

A. I couldn't say.

Q. Were you told over the phone anything on August 9th about these two cars?

A. Well, I might have been but I don't remember if I was. I didn't make any notation of it.

Q. Is Mr. Spiking here?

A. Mr. Spiking is at Gibson.

Q. Now, you speak about Gibson not having been a repair point; do you have any employés at all in the Gibson yard?

A. One man at that time.

Q. What did he do?

A. He inspected cars and made some light repairs if he discovered them.

Q. So that you did have at the time these cars were moved from Gibson, a man whose business it was to inspect cars and make light repairs?

A. Yes sir.

Q. I will ask you whether that was a division terminal for certain trains at that time.

By Mr. BRECKENRIDGE: Objected to as not proper cross-examination. Overruled and defendant excepts.

A. Yes sir.

Q. Roundhouse there?

A. Yes sir.

Q. Engines take off trains and put on trains?

A. Yes sir.

Q. Crews turned?
A. Yes sir.

Witness excused.

W. A. BENTLEY, a witness produced on behalf of defendant, being first duly sworn, testified as follows:

Examined in chief.

By Mr. BRECKENRIDGE:

Q. How old are you?
A. Thirty-six.
Q. Where do you live?
A. Wymore, Nebraska.
Q. What is your business?
A. Car foreman.
Q. In the employ of what company?
A. The Burlington.
Q. Does the Burlington have a repair shops or station there at Wymore?
A. Yes sir.
Q. Do you recollect repairs that were made on Northern Pacific car #5764 in January 1906.
68 A. I do not remember I have records of it.
Q. Have you got a record that will show what was done with that car?
A. Yes sir.
Q. Just state where Wymore is?
A. It is south of Lincoln sixty miles.
Q. In the State of Nebraska?
A. Yes sir.
Q. Now, what is the book you have there, Mr. Bentley?
A. I have a book record of the date the car was bad ordered and sent to the repair track and the date o. k'd.
Q. And a description of the repairs that were put on?
A. Yes sir; I also have the piece of work called for the repairs made.
Q. Now, that book that you have there shows the repairs that were put on this car and the date of repairs, does it?
A. Yes sir.
Q. Turn to the record and let us see what repairs were put on this car?

By Mr. WALTER: Let me look at the record first. (Examines record)

Q. What does the record show as to the repairs on this car date and kind of repairs, Northern Pacific car #5764?
A. The card showed the N. P. car #5764, work by repair men James and Meiser; two buffer blocks or dead trucks you might call them, and anchor bolt; one short bolt, 1 long bolt, 2 braces on B end, 1 brake staft, brake staft step, top, 5 corner plates top, 3 bottom plates, roof renailed, 1 foot of floor patching, 13 feet of girth and 11

grab irons, 24 feet of lining, 2 pin lifters and one end jacked in, 4 end posts, 2 on A end and 2 on B end, 2 corner posts on B end, 1 truss rod on section 2, roofing patches, 16 feet of sheeting, 1 truck out and in.

Q. Well, there wasn't much to that car that wasn't done over, was there? Those were the repairs that were put on at Wymore at that time? What date was it?

A. January 17, 1906.

Q. And what date was the car turned out of the shops to travel?

A. On the 17th.

Q. Now, you have referred to two pin lifters; what are these two lifters, just describe them?

A. These lifters are the operating rod to the coupler chain. To raise and operate the knuckle lock.

By Mr. BRECKENRIDGE: You agree, do you, Mr. Walter, that his description of these particular pins called pin lifters corresponds with the description made by the witness of the government as to the defect in this car.

By Mr. WALTER: No, the defect in this case was the clevis which has nothing to do with the pin lifter at all except as connected to it.

69 Q. Now, this car, Mr. Bentley, was discovered later on according to the government inspectors with a broken clevis? Was there in the repairs that were made upon the car or was there at the time the car was repaired and set out as o. k. a broken clevis on the car?

A. Well, I wouldn't say whether the clevis was broken when they commenced on the car, but it was necessary to remove the chain and pin lifter from the clevis when they applied the buffer block at both ends.

Q. So that to complete the repairs, it would be natural that all that part of the apparatus would be put in shape?

A. Yes sir.

Q. Just what connection had the clevis with the pin lifter that you describe?

A. It is a small clevis and an eye in the end of the pin lifter that the pin goes through.

Q. Well, the clevis is a part of these pins?

A. Yes sir.

Q. Who do you say made these repairs?

A. James.

Q. Is Mr. James here?

A. Yes sir.

Q. Did you have anything to do with the repairs personally?

A. Not any more then to look it over, see that they were doing the work properly.

Q. You recollect seeing that car there, do you?

A. I see every car that comes on the track; I don't remember this one in question.

Q. But it is your business to oversee the work of repairs as being done?

A. Yes sir.

Q. And were you on duty in the performance of your service at this particular date?

A. Yes sir.

Cross-examination.

By Mr. WALTER:

Q. Wymore is some several hundred miles away from Seneca, isn't it?

A. I don't know where Seneca is; Wymore is sixty miles south of Lincoln.

Q. This was on the 17th day of January?

A. Yes sir.

Q. Where did you get that car- that gives the number of repairs?

A. We keep them as our record.

Q. That was in the records where you found it?

A. Yes sir.

Q. Has it been changed since you first saw it?

A. No sir, it has not.

Q. And you put 11 grab irons on that car?

A. Yes sir.

Q. And you say you had to disconnect the pin lifter from the clevis before you could put in the buffer blocks?

A. Yes sir.

Q. The clevis is not part of the pin lifter, is it?

70 A. Well, it is coupled to it.

Q. But it is not part of it, is it?

A. No, no part of the pin lifter.

Q. So that when the pin lifters were put in the two which you mentioned on that car, they had nothing to do with the clevis, did they?

A. Yes sir, they were connected with the clevis.

Q. Well, the putting on of a pin lifter does not have anything to do with the clevis?

A. Yes sir, because you have to connect it or disconnect it.

Q. But in putting those pins on there you have no recollection that any clevis was put on?

A. No sir.

Q. And for all you know the clevis was there when the pin lifter was put on?

A. As far as I know.

Q. But you would have to disconnect the two when you put the blocks on?

A. Yes sir.

Q. To disconnect that clevis you must take out the cotter pin and take out the larger pin which goes across the ends of the clevis?

A. Yes sir.

Q. Those two do not stay together, they are separate parts and the pin may be pulled from the clevis?

A. Yes sir.

Q. Then is there anything which keeps the clevis from coming out of the top link?

A. No sir.

Q. Do you know whether that car when it left these shops at Wymore had the pin lifter connected to this chain?

A. Well, I don't remember the car personally, but——

Q. Do you know of your own knowledge whether it was connected?

A. Well, I do know that all cars are before they leave.

Q. Oh, you do know that personally before they leave?

A. Yes sir, because I make it a point to see that they do.

Q. But you don't remember this car particularly?

A. No sir, only by record.

Q. Did it leave in the day or night?

A. Five o'clock in the evening.

Q. How do you know that?

A. They have a regular hour for pulling the track.

Q. That is all you know about this car, that it may have left at the regular hour?

A. Yes sir.

Q. Now, I will ask you whether you have any recollection at all of this particular car aside from the record you have?

A. No I don't.

Q. You know nothing about that car except what would ordinarily happen in the course of business?

A. No, I don't.

Witness excused.

U. R. JAMES, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

71 Examined in chief.

By Mr. BRECKENRIDGE:

Q. Where do you live?

A. Wymore, Nebraska.

Q. How long have you lived there?

A. About 24 years.

Q. What is your business?

A. Car repairer.

Q. For the Burlington?

A. Yes, sir.

Q. Do you work under the direction of Mr. Bentley, the foreman who was just on the stand?

A. Yes, sir.

Q. How long have you been engaged in work down there in this service?

A. About eight or nine years.

Q. Now do you recollect in January 1906, of making some repairs on Northern Pacific car # 5764?

A. Well I couldn't swear to any particular work, we have so much different work all through.

Q. But is there any record of repairs on cars to which you can refer and by which you can satisfy yourself that you did work on this car

A. Yes, sir, the record that Mr. Bentley has—here shows that.

Q. Examine that record, if you please, and refresh your memory; did you make this record, Mr. James?

A. No, sir.

Q. Who did make the record?

A. The checker, we have a checker that checks up our work; after we get a car through he comes around and we check the work in to him, and he puts it on the record.

Q. Can you by referring to this record refresh your recollection as to what was done on this car, as to the nature of the repairs put on that car?

A. I could not be positive on account that we have so many different cars, probably work running a good deal the same, and different kinds, I could not swear positively.

Q. Customarily, however, is the work done on cars recorded as the work on that car was recorded?

A. Yes, sir, they are recorded on this card, and we are paid by this card.

Q. Were you paid for the work you did on that car by that card?

A. Yes, sir.

Q. Can you from that record refresh your recollection as to repairs on this particular car, or would you be obliged to rely wholly on the record as telling?

A. I would rely on the record being correct.

Q. But have you any recollection independent of that record?

A. Not to be positive.

By Mr. BRECKENRIDGE: I will offer in evidence the record, the card.

By Mr. WALKER: It is agreed between us that these records may be produced without any further verification in the ordi-
72 nary course of business. And it is further agreed that the entry of repairs to this car was read by witness W. A. Bentley, and the record itself need not be produced.

Q. How long have you been employed by the Burlington?

A. About eight or nine years.

By the COURT:

Q. Do you refer both to this record and the record of the car foreman, also?

A. This is the record of the car foreman.

The witness excused.

MISSOURI SWAIN, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined in chief.

By Mr. BRECKENRIDGE:

Q. Where do you live?
A. Ravenna, Nebraska.
Q. What is your age?
A. Forty-two.
Q. How long have you lived at Ravenna?
A. Seventeen years.
Q. What is your business?
A. Foreman of car repairs and inspectors.
Q. That is for the Burlington?
A. Yes, sir.
Q. And how long have you been in the employ of the Burlington?
A. Seventeen years.
Q. And in the same capacity?
A. Yes, sir.
Q. Well, have you been at Ravenna all the time?
A. At Ravenna since 1890, moved there in 1890, seventeen years ago this fall.
Q. Are there other men working with you in this capacity?
A. Yes, sir.
Q. How many other men in the inspecting and repairing crew?
A. Now, you mean, or at that time?
Q. In January, 1906?
A. I guess there were about eight or nine men at that time, all told.
Q. Ravenna is a division point, isn't it?
A. Yes, sir.
Q. And what is the custom and practice of the railroad company by yourself and the men working with you with respect to the inspection of freight cars passing through?
A. Why we inspect all trains passing through there, all cars, they are all inspected.
Q. When cars are defective or repairs are put upon cars, is there any record made?
A. We always keep a record of it if we made repairs or any repairs are needed.
73 Q. Who makes that record?
A. Always, my inspectors always note it down, always turn it into me if I ain't right with them, I always keep a record of it there in the books.
Q. Have you any personal recollection of inspecting Northern Pacific car #5764 going through Ravenna in 1906?
A. I have not.
Q. Have you made an examination of the records made by you and your men at Ravenna on or about January 26th, 1906?
A. I have and there is nothing against the car.

Q. What do you mean by that expression, "nothing against the car?"

A. Well, there is no defects, nothing recorded with respect to this car.

Q. That was at Ravenna?

A. Yes sir.

Q. How far is Ravenna from Alliance?

A. About two hundred miles.

Q. And how far is Ravenna from Lincoln?

A. About 120 miles.

By the COURT:

Q. Is Seneca between Ravenna and Alliance in your stipulation?

By Mr. WALKER:

A. Well not by stipulation, but that is the case, isn't it?

By the WITNESS: Yes, sir.

Cross-examination.

By Mr. WALKER:

Q. And you are employed at Ravenna?

A. Yes sir.

Q. And you were employed there in January, 1906?

A. Yes, sir.

Q. And you have how many men there?

A. There must have been about ten working at that time.

Q. Day and night?

A. With the day and night men.

Q. How many worked during the day?

A. Well there will be eight working day times, I have two night men on at that time.

Q. Now were they doing passenger or freight work?

A. Why they did both.

Q. How many trains go through there, passenger trains, during the day?

A. At that time I think there were—through the 24 hours, you mean?

Q. Yes, sir.

A. At that time I think three each way.

Q. Making six passenger trains to be inspected?

A. Yes, sir.

74 Q. And how many freight trains?

A. Regular trains, there would be about two, I think, each way.

Q. Well how many extra about that time?

A. It would be hard to tell.

Q. Well on an average?

A. At that time there wouldn't be very many extras running at that time of year.

Q. Now trains were made up there?

A. Yes, made up and switched there.

Q. It was a division terminal?
A. Yes sir.
Q. Crews turned there?
A. Yes, sir.
Q. Switching done there?
A. Yes, sir.
Q. Defects occur there?
A. Yes, sir, I suppose so.
Q. You say you examined the records out there, what records did you look over?
A. I looked over the books where the charges would be made for those repairs, and where they kept the records of "bad order" cars.
Q. If you did not find any defects there you would have no record of it?
A. No, sir.
Q. So all you say is that you have looked over your records and you find nothing there to show that it was bad?
A. That is right.
Q. It may have been defective and you have no record of it?
A. No, I think not.
Q. Why not?
A. Because we watch them very closely.
Q. You never make mistakes?
A. Well we are not supposed to make mistakes.
Q. Weren't there times when you had so many trains looking after passengers coming in at the same time with freight trains that you had to skimp your work?
A. Not necessarily.
Q. I am not asking necessarily or unnecessarily.
A. No.
Q. You always carefully inspected every car?
A. We always do that after the other trains leave, we always do that.
Q. What do you inspect for?
A. All defects of the car, anything that is bad off, the siding, the roof, the safety appliances, the doors, the wheels, the brake beams—in short every part of the car.
Q. And you have how many men during the day time?
A. Eight men.
Q. Eight in the day and two at night? Did these men always do that?
A. Always done that.
Q. Did you ever find any complaint about their not having discovered all the defects going out?
A. Don't know that I ever have.
75 Q. Now are these men working in the yard or about the repair tracks?
A. Work on the repair tracks when there are no trains there to look over.
Q. Now when the trains come in you call the men over from the repair tracks?

A. No, we have regular men that look after these.
Q. Now how many men look after the trains going through?
A. Two men look after every train.
Q. And they have six passenger trains?
A. There are more men on the passenger trains, two men can't attend to the passenger trains.
Q. How many men do you have on the freight trains?
A. Have two.
Q. And how many on the passenger?
A. Well we do more work than inspecting on the passenger.
Q. What else?
A. We water, ice and everything; then we have to give them supplies, we generally have about six or seven men on them to attend to them, but two men do the inspecting.
Q. And you only have two men on the freight trains?
A. Two.
Q. Now don't your men only inspect for running defects?
A. No, sir, we inspect for everything.
Q. In and out?
A. Well not always out but it is not always necessary to inspect a train going out; there is always a man in the yard, though, when a train is made up to go out.
Q. Well defects may occur and do occur, do they not, after a train has arrived in the yard, and before it goes out?
A. There is a man to attend to such things as that if it does.
Q. But they do break?
A. If they break we fix them.
Q. But you say you don't always inspect a train going out?
A. We have a man in the yard whenever a train goes out.
Q. Didn't you say you don't always have them inspected when they go out?
A. We always have a man there, but it is not necessary to make any thorough inspection, we always have a man to attend to the air and things like that.
Q. Did you have a man there to attend to the air?
A. I did, all the time.
Q. How far is Wymore from Seneca?
A. I don't know, Seneca is about 250 miles west of Lincoln, I guess.
76 Q. And sixty miles up to Lincoln?
A. Something like that.
Q. So it would be 300 miles?
A. About that.
Q. And you say your place, Ravenna, is how far from Seneca?
A. One hundred and thirty miles.
Q. Between Lincoln and Seneca?
A. Yes, sir.

Witness excused.

B. F. TURNER, a witness recalled on behalf of the defendants, having been duly sworn, testified as follows:

Examined.

By Mr. BRECKENRIDGE:

Q. State whether or not there was any system in the Omaha yards by which repairs were made on certain tracks?
A. Yes, sir.
Q. Describe it, where were the repairs made?
A. On 19 and 20 tracks.
Q. They were the repair tracks?
A. Yes, sir.
Q. Now suppose a car is discovered in bad order, we will say on track 12, where will the repairs be made, is that car taken to the repair track?
A. Not necessarily, some light repairs would be made in the yard.
Q. On the same track?
A. Yes, sir.
Q. What do you mean by light repairs?
A. Such as grab irons and pin chains and putting on brake shoes such light work as that.
Q. That is, if a car was to be used if it was continuing on, those repairs would be made right there, wouldn't they?
A. Yes, sir.
Q. Well you have to have your tracks free and clear for use, do you not?

By Mr. WALTER: I object to that manner of interrogating.
Sustained and defendant excepts.

Q. What is the necessity for repair tracks, Mr. Turner?
A. Well, we make heavy repairs, putting in wheels and couplers and such as that is done on the repair track. And safety appliances, we have a man that goes around through the yards and makes these, where they find them in the yard.
Q. What in the ordinary natural course of business would be done with a car marked thus; "Bad order, repair track when empty"?
A. That car would be repaired in the yards provided they could make the repairs there, light repairs, but the inspector goes through the yard and inspects the cars and marks them that way
77 or cards them and the safety appliance man comes along and if he can repair them he repairs them.
Q. I do not understand, do you have in your crew a man or men whose duty it is to make repairs to safety appliances?
A. Yes, sir.
Q. He has charge of that special duty?
A. Yes, sir.
Q. Though it would not necessarily follow that because a car was carded to be sent to the repair track that the repairs would have to be made on a repair track, but they might be made where the car stood?

A. Yes, sir.

Q. Now have you any means of knowing, either by your own personal knowledge, or by the record which you have produced here, where the repairs on these two coal cars, #86192 and #80263, were made on the 9th day of August, 1905?

A. I couldn't say which track, but they were made in the yard, my records will show that and the man that made them.

Q. How is that?

A. I couldn't say whether he repaired them on #12 or what track but he didn't work on the repair track.

Q. Then you know from that record that they were repaired in the yard?

A. Out in the yard, yes, sir.

Witness excused.

The Defendant Rests. Adjournment was here taken to 9:30 A. M. October 5th, 1907.

October 5, 1907, 9:30 A. M. Pursuant to adjournment the following proceedings were had:

By Mr. BRECKENRIDGE: Defendant again renews the motion made at the close of the plaintiff's case.

The defendant moves the Court to instruct the jury upon counts II and III in O-31 and each thereof, in favor of the defendant. And the defendant moves the Court to instruct the jury to return a verdict in favor of the defendant in O-88.

By Mr. WALTER: The plaintiff moves the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant in the First Count of O-31.

The plaintiff moves the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant in the Second Count of O-31.

The plaintiff moves the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant in the Third Count of O-31.

78 The plaintiff moves the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant in the cause of action stated in O-88.

By the COURT: In the case now on trial both parties have presented motions asking that the jury be peremptorily instructed and I have considered the requests and have concluded to peremptorily instruct the jury on each count in the petition.

The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support each count in the petition, provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute declares an offense, whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict in favor of the government.

There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the

conclusion that knowledge is not an element of the offense under the statute. The chief purpose of the act of Congress, as pronounced by the various courts that have passed upon it, was the protection of the lives and safety of the trainmen who have occasion to pass between the cars or to work in and about them, and the act should be construed so as to give this intent full force, if such a construction can be given to the act without doing violence to the language. Any other construction that this requires, not only that the carrier should fail to have the cars properly equipped, but also that the defect should have existed for such a length of time as would reasonably allow the presum-tion of inspection and notice on the part of the carrier. That interval would then depend upon the verdict of the jury in each instance—in some cases it might exist only for an hour; in other cases it might exist for days, or for a sufficient number of hours to move from one inspecting station on the railway to another inspecting station. This construction of the act concludes that Congress did not intend to protect the lives or provide for the safety of a train crew during such period as the jury should find would be sufficient for the company in the ordinary method of doing business to discover and remedy this defect. This seems to me an unreasonable construction. If the offense that is specifically charged here depends upon its being knowingly committed, it would seem that under each section of this act, in order to render a railway guilty of noncompliance, such an offense should be knowingly committed, and that leads to what seems to me an absurdity.

For instance, the fifth section of the act requires that the
79 standard height of the drawbar above the top of the rails is to be fixed at a certain distance, from which distance a maximum variation is allowed. If the act is not violated when there is a variation within that maximum distance, then it would appear that if there is an additional variation of another inch, or 2 or 3 inches, not knowingly allowed, and there has been ordinary care and diligence used, no offense is committed under this act. By the same process of reasoning, under section 2 of the amended act, it would not be a violation of the law to have less than the designated percentage of cars operated by power brakes, but such less percentage must be known to the company.

I find upon an examination of the opinions cited in the argument that there have been decisions by a number of courts, all holding, in effect, that knowledge and diligence are not ingredients of the offense. United States v. Southern R. Co. (D. C.) 135 Fed. 122; United States v. C., M. & St. P. Ry. Co., 149 Fed. 486; United States v. G. N. Ry. (D. C.) 150 Fed. 229; United States v. P. Ry. (D. C.) 154 Fed. 897; United States v. Atlantic, etc., Ry. (decision by Judge Purnell, May 11, 1907) 153 Fed. 918; While the decision in the case of United States v. A. T. & S. F. R. R. (D. C.) 150 Fed. 442, is to the contrary, yet it seems to me that, Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time

before repairs could be made, and that therefore the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employees, provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment. Defendant is given an exception to this instruction as applied to each count covered.

By Mr. GREENE: Your Honor, under your view of the statute, if an appliance got out of order between stations——

By the COURT: Logically I think the act makes the company an insurer of the safety of appliances regardless of how the accident occurs.

80 By Mr. BRECKENRIDGE: In whose favor, in favor of the Government or in favor of the employé?

By the COURT: Well the case we have here, in favor of the Government.

By Mr. GREENE: All I want is an expression of your view in the record. It ought to be settled by some court finally.

By the COURT: I understand that these actions are now in process of final decision.

The foregoing bill of exceptions contains all the evidence given or offered on the trial of the causes of The United States of America v. Chicago, Burlington & Quincy Railroad Company (88-O and 31-O consolidated for trial by stipulation), and correctly shows the proceedings on said trial; and said bill of exceptions is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Done at the September, 1907, term of said Court, to-wit: On this 17th day of December, 1907.

THOMAS C. MUNGER, *Judge.*

Now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case and prays that the same may be settled and allowed and signed and certified by the court, and made a part of the record in the case, as provided by law.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Defendant..

Received the above draft of proposed bill of exceptions this 5th day of November 1907, and have no amendments to propose.

CHARLES A. GOSS,
United States Attorney, Attorney for Plaintiff.

Endorsed: Filed Dec. 18, 1907. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 27th day of December, 1907, Præcipe for Record was filed in said case, which said Præcipe is in words and figures following, to-wit:

In the District Court of the United States for the District of Nebraska, Omaha Division.

81 31-O & 88-O. Consolidated.

UNITED STATES OF AMERICA
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Præcipe for Record.

To the Clerk of said Court:

Please make record for appeal to the United States Circuit Court of Appeals, including the following, to-wit:

In 31-O: Petition,
Answer,
Replication.

In 88-O: Petition,
Answer,
Replication,
Order consolidating with No. 31-O for trial.

In 31-O: Order consolidating with No. 88-O for trial.
Trial—Oct. 3, 4, & 5, '07.
Verdicts.
Judgments.

Stipulation in matter of consolidation in matter of appeal.
Assignment of errors,
Order allowing appeal.
Supersedeas Bond,
Writ of Error,
Citation,
Bill of Exception,
Præcipe for record.

In the above entitled cause, as consolidated.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Attorneys for Defendant.

Endorsed: Filed Dec. 27, 1907. R. C. Hoyt, Clerk.

Certificate.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, hereby certify that pursuant to the foregoing Writ of Error and in obedience thereto, and in
82 compliance with the Præcipe (a copy of which is found on page 135 hereof), the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Præcipe and as indicated in the foregoing Index, in the case of the United States of America, vs. Chicago, Burlington & Quincy Railway Company, Nos. 31-O and 88-O, Consolidated for trial; and that copies of the Writ of Error and Citation, duly certified, have been lodged and remain in my said office as such Clerk.

Witness my hand and the seal of said Court, at Omaha, in said District, this 29th day of January, 1908.

[Seal U. S. District Court, District of Nebraska, Omaha Division.]

R. C. HOYT, *Clerk.*

Filed: Feb. 1, 1908. John D. Jordan, Clerk.

83 *(Clerk's Certificate to Printed Record.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of the Chicago, Burlington & Quincy Railway Company, Plaintiff in Error, vs. United States of America, No. 2787, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of July, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

84 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1908, of said Court, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John A. Riner, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the first day of February, A. D. 1908, a transcript of record, pursuant to a writ of error directed to the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Chicago, Burlington & Quincy Railway Company, was Plaintiff in Error, and the United States of America, was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2787.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

85 (*Appearance of Counsel for Plaintiff in Error.*)

On the first day of February, A. D. 1908, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2787.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Omaha, Nebraska.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2787. Chicago, Burlington and Quincy Railway Co., Pl'ff in Error, vs. United States of America. Appearance. Filed Feb. 1, 1908, John D. Jordan, Clerk. Charles J. Greene, Ralph W. Breckenridge, Counsel for Pl'ff in Error.

(Appearance of Mr. Charles A. Goss as Counsel for the Defendant in Error.)

And on the third day of March, A. D. 1908, the appearance of Mr. Charles A. Goss, as counsel for defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2787.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

86 CHARLES A. GOSS,
United States Attorney, Dist. of Nebraska.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2787. Chicago, Burlington and Quincy Railway Co., Plff. in Error, vs. United States of America. Appearance. Filed Mar. 3, 1908. John D. Jordan, Clerk. Charles A. Goss, Counsel for Deft. in Error.

(Appearance of Mr. Philip J. Doherty as Counsel for Defendant in Error.)

And on the fourteenth day of December, A. D. 1908, the appearance of Mr. Philip J. Doherty, as counsel for defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2787.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

PHILIP J. DOHERTY.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2728. Chicago, Burlington and Quincy Railway Company, plaintiff in Error, vs. United States of America. Appearance. Filed Dec. 14, 1908, John D. Jordan, Clerk. Philip J. Doherty, Counsel for Deft. in Error.

(*Order of Submission.*)

And on the fourteenth day of December, A. D. 1908, in the record of the proceedings of said United States Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

MONDAY, *December* 14, 1908.

87 No. 2787.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the District of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ralph W. Breckenridge in behalf of the plaintiff in error, continued by Mr. Philip J. Doherty and Mr. Charles A. Goss for the defendant in error and concluded by Mr. Charles J. Greene for the plaintiff in error.

Thereupon the cause was submitted to the Court upon the transcript of record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-fourth day of April, A. D. 1909, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

88 United States Circuit Court of Appeals, Eighth Circuit.

No. 2787. December Term, A. D. 1908.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the District of Nebraska.

Mr. Charles J. Greene and Mr. Ralph W. Breckenridge for plaintiff in error.

Mr. Philip J. Doherty and Mr. Charles A. Goss (Mr. A. W. Lane and Mr. Luther M. Walter were with them on the brief) for defendant in error.

Before Sanborn and Adams, Circuit Judges, and Riner, District Judge.

ADAMS, Circuit Judge, delivered the opinion of the court:

Two suits were instituted by the United States to recover penalties for violating the safety appliance act of 1893 (27 Stat. 531) as amended by the subsequent acts of 1896 and 1903 (29 Stat. 85; 32 Stat. 943). Three separate violations are complained of in one suit and one in the other; but the two, having been consolidated for the purposes of a trial, will be treated as one suit with four counts.

The several counts charge the use in interstate traffic by the defendant Railway Company of four separate cars of insufficient coupling appliances or insufficient grab-irons or hand-holds. They set forth all other facts essential to a cause of action in favor of the United States. After issue joined a trial was had and at the close of all the evidence each side moved for a peremptory instruction in its favor. The court instructed for plaintiff and a verdict was rendered accordingly. Due exceptions were preserved to this action and the present writ of error challenges its correctness.

Both sides having requested an instructed verdict in their favor, under a familiar rule of practice, there are only two questions open for consideration by us: first, was there substantial evidence supporting the finding; and second, did the court commit any error of law during the trial? *Empire State Cattle Co.* v. *Atchison, T. & S. F. Ry. Co.*, 77 C. C. A. 601, 147 Fed. 457, 459, and cases there cited. No claim is made under the latter head so we are left to inquire solely as to whether the judgment below is supported by any substantial evidence. The cause is simplified by the concession of counsel for the Railway Company that there was evidence tending to prove the defective condition of each of the four cars as charged and that they were all being used at the time stated in the several counts in hauling interstate commerce or as a part of a train containing other cars which were doing so.

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The sole contention is, that notwithstanding this concession, in as much as it appears by the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law but on the contrary had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. Learned counsel concede what is undoubtedly true, that sustaining their contention involves a reversal of the doctrine unanimously declared by this court in *United States* v. *Atchison, T. & S. F. Ry. Co.*, — C. C. A. —, 163 Fed. 517, and *United States* v. *Denver and Rio Grande R. R. Co.*, — C. C. A. —, 163 Fed. 519, and a disregard of what they call the dictum of the Supreme Court in *St. Louis & Iron Mountain Ry. Co.* v. *Taylor*, 210 U. S. 281; and they accordingly invite us to enter upon a reconsideration of the questions so decided.

It was held by us, and in our opinion it was necessarily held by the Supreme Court in the Taylor case, that the duty of railroads under the statute in question is an absolute duty and not one which

is discharged by the exercise of reasonable care or diligence. Since those cases were decided this court in the case of *Chi. Mil. & St. P. Ry. Co.* v. *United States,* — C. C. A. —, 165 Fed. 423, has again approved of their doctrine and the Circuit Court of Appeals for the Fourth Circuit in the case of *Atlantic Coast Line R. R. Co.* v. *United States,* decided March 1, 1909, and not yet reported, in considering this question, made a review of pertinent authorities and particularly of the cases of this court as well as of the Taylor case, and in an exhaustive opinion reached the same conclusion that we did.

The main ground for asking a reconsideration of our former rulings is presented in an argument drawn from the assumed criminal character of the proceeding against the railroads authorized by the safety appliance law. It is argued that no criminal offense can be committed when no injury has befallen any one or when there is no intent to do the act constituting the offense and that no such offense can be established by construction. Whether these positions are maintainable as abstract propositions of law or not, concerning which we express no opinion, they have no application to the present case. This is not a criminal case. It is a civil action in the nature of the action of debt to recover a penalty, which Congress in its wisdom saw fit to impose upon railroads to secure compliance with certain specified regulations made to promote the safety of passengers and freight carried in interstate commerce and to protect employés engaged in that service. After making provisions for the automatic coupling devices and grab-iron and handholds, the statute enacts that any common carrier making use of any car not equipped as required by the act "shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States" * * *. (Sec. 6 of the act of 1893). This is not the language employed in fixing punishments denounced for criminal offenses. The act made it unlawful for railroads to use cars not equipped as therein provided and thereby imposed a duty upon railroad companies to equip cars accordingly. This was by clear and unequivocal language of the law maker made an absolute duty not dependable upon the exercise of diligence or the existence of any wrong intent on the part of the railroad companies. Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know they were in order and kept in order at all times. (Cases *supra*). A breach of this duty like the breach of most civil duties naturally entailed a liability, and Congress fixed that liability not as a punishment for a criminal offense but as a civil consequence, so far as the Government was concerned, of a failure to perform the duty which in the opinion of Congress the public weal demanded should be performed by railroad companies.

Such, in effect, has been the ruling upon this statute in the following cases: *United States* v. *Central of Georgia Ry. Co.*, 157 Fed. 893; *United States* v. *Philadelphia & R. Ry. Co.*, 160 Fed. 693; *United States* v. *Louisville & N. R. Co.*, 162 Fed. 185; *United States* v. *Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States* v.

Louisville & N. R. Co., — C. C. A. —, 167 Fed. 303; *United States* v. *Illinois Central R. R. Co.*, recently decided by the Circuit Court of Appeals for the Sixth Circuit, unreported.

In *Fortune* v. *Incorporated Town of Wilburton*, 73 C. C. A. 338, 142 Fed. 114, we had under consideration an action for violating an ordinance which subjected the offender to a fine and provided that the same might be enforced by imprisonment. We there held that the action for the fine was a civil action. Judge Hook, speaking for the court, said: "The weight of authority is that such an action is civil in character and not criminal even though as in this case, payment of the penalty assessed is authorized to be enforced by the arrest and detention of the persons."

In the recent unreported case of *New York Central and Hudson River Railroad Co.* v. *United States*, decided by the Circuit Court of Appeals for the First Circuit, Judge Putnam, speaking for the court in an action to recover a penalty for violating the act of June 29, 1906 (34 Stat. 607), known as the twenty-eight hour law, after reviewing authorities English and American, said: "Therefore, in view of *Atcheson* v. *Everitt* and other authorities cited, we must agree that, both in the United States, subject to the limitations we have stated, and in England, the present proceeding is held to be 'as much a civil action as an action for money had and received,' using the language of Lord Mansfield. While, as we have said, certain guaranties of the Constitution apply, none of them
91 touch any of the questions involved which are raised by the plaintiff in error; and the rules of pleading and procedure and evidence for this suit are those which apply to an ordinary civil action for debt between private parties."

In *United States* v. *B. & O. S. W. R. Co.*, — C. C. A. —, 159 Fed. 33, 38, 39, the Circuit Court of Appeals for the Sixth Circuit had under consideration the same twenty-eight hour law. The action was to recover a penalty and the contention was made that it was criminal and not civil. The court, in an opinion on a motion for rehearing, disposed of that contention by saying: "The petition in each case was for the recovery of a penalty, and the actions are in the similitude of the common law action for debt, the form being simplified by the rules of Code pleading." * * * "The action of debt has long been used, and regarded as the appropriate remedy for the collection of penalties prescribed for the violation of statutes." * * *

The Supreme Court in *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 265; in *United States* v. *Zucker*, 161 U. S. 475, 481; in *Schick* v. *United States*, 195 U. S. 65, and in *Hepner* v. *United States* (just decided but not reported), treating respectively of violations of the National revenue laws; of the customs administrative act; of the oleomargarine act of 1886 and of the act regulating the immigration of aliens, announced principles which, in our opinion, are consistent alone with the theory that this is a civil action. To the same effect also are the following cases: *Hawloetz* v. *Kass*, 25 Fed. 765; *The Good Templar*, 97 Fed. 651; *City of Sparta* v. *Lewis*, 91 Tenn. 370, 23 S. W. 182; *Campbell* v. *Burns*, 94 Me. 127,

46 Atl. 812; *United States* v. *Brown*, Fed. Case No. 14,662, (24 Fed. Cas. 1248).

The exhaustive opinion of Judge Evans, in *United States* v. *Illinois Cent. R. Co.*, 153 Fed. 182, to which our attention is called, in which the contrary conclusion was reached, has been carefully considered, but we are unable to give our assent to its conclusion.

For the reasons stated and on the strength of the authorities cited, notwithstanding the able argument made to the contrary, we must adhere to the conclusions heretofore reached. The judgment must be *Affirmed*.

Filed April 24, 1909.

92 (*Judgment.*)

And on the twenty-fourth day of April, A. D. 1909, in the record of the proceedings of said United States Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

SATURDAY, *April* 24, 1909.

No. 2787.

THE CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

APRIL 24, 1909.

(*Motion for Order Staying Mandate.*)

And on the third day of June, A. D. 1909, a motion for an order staying the mandate was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2787.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Motion.

93 Comes now Plaintiff in Error and moves the Court for an order withholding mandate in this case until November 1, 1909, so as to permit presentation of an application to the Supreme Court of the United States for a writ of certiorari herein.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Attorneys for Plaintiff in Error.

Omaha, Nebraska, June 2, 1909.

(Endorsed:) 2787. United States Circuit Court of Appeals. Chicago, Burlington & Quincy Railway Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Motion. Greene & Breckenridge, Attorneys for Plaintiff in Error. Filed Jun. 3, 1909. John D. Jordan, Clerk.

(*Order Staying Issuance of Mandate.*)

And on the fourth day of June, A. D. 1909, in the record of the proceedings of said United States Circuit Court of Appeals for the Eighth Circuit is an order staying the issuance of the mandate in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1909.

FRIDAY, *June* 4, 1909.

No. 2787.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the District of Nebraska.

This cause came on to be heard upon the motion of counsel for plaintiff in error for an order staying the mandate herein.

On Consideration Whereof, and in pursuance of said motion, it is now here ordered that the mandate in this cause be, and the same is hereby, stayed until and including the first day of November, 1909, pending an application by the plaintiff in error to the Su-
94 preme Court of the United States for a writ of certiorari to review the judgment of this Court.

95 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit (except the transcript of the record from the District Court of the United States for the District of Nebraska), in a certain cause in said Court wherein the Chicago, Burlington & Quincy Railway Company is Plaintiff in Error, and the United States of America is Defendant in Error, as full, true and complete as the originals of same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of July, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

96 United States Circuit Court of Appeals, Eighth Circuit.

No. 2787.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Stipulation as to Clerk's Return to Writ of Certiorari.

It is hereby stipulated and agreed by and between the parties hereto, that the certified copy of the entire record in the above entitled cause in the United States Circuit Court of Appeals for the Eighth Circuit, which was filed by the above-named plaintiff in error in the Supreme Court of the United States with its petition to said Supreme Court for a writ of certiorari requiring the said

cause to be certified to said Supreme Court for its review and determination, shall be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on November 2nd, 1909, in the said case of the Chicago, Burlington & Quincy Railway Company, plaintiff in error, vs. United States of America, defendant in error;

And the clerk of the said United States Circuit Court of Appeals for the Eighth Circuit, is hereby requested to send up to the said Supreme Court of the United States a copy of this stipulation as his return of said return of said writ of certiorari.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
Plaintiff in Error.
By CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Its Attorneys.
UNITED STATES OF AMERICA,
By LLOYD W. BOWERS, *Solicitor General.*

(Endorsed:) No. 2787. United States Circuit Court of Appeals, Eighth Circuit. Chicago, Burlington & Quincy Railway Company, Plaintiff in error, vs. United States of America, Defendant in error. Stipulation as to clerk's return to writ of certiorari. Filed Nov. 19, 1909, John D. Jordan, Clerk.

97 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Chicago, Burlington & Quincy Railway Company is plaintiff in error, and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the
98 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of November, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

99 [Endorsed:] File No. 21,828. Supreme Court of the United States. No. 602, October Term, 1909. Chicago, Burlington & Quincy Railway Company vs. The United States. Writ of certiorari. Filed Nov. 19, 1909. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Chicago, Burlington & Quincy Railway Company, Plaintiff in Error, vs. United States of America, No. 2787, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this nineteenth day of November, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

100 [Endorsed:] File No. 21,828. Supreme Court U. S. October Term, 1909. Term No. 602. Chicago, Burlington & Quincy Railway Company, Petitioner, vs. The United States. Writ of certiorari and return. Filed November 22, 1909.

SUPREME COURT OF THE UNITED STATES

CHICAGO, BURLINGTON AND QUINCY
RAILWAY COMPANY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Chicago, Burlington & Quincy Railway Company, shows unto your Honors the following facts:

I.

On December 13, 1905 (printed record 1), respondent brought an action against petitioner, which is a corporation created under the laws of the state of Iowa, having an office and place of business at Omaha, in the state of Nebraska, in the district court of the United States, within and for the district of Nebraska, claiming judgment for $300.00 for three separate penalties for three separate violations of the act of Congress known as the Federal safety appliance act of 1893 (27 Stats. 531), as amended by the subsequent acts of 1896

and 1903 (29 Stats. 85, 32 Stats. 943); and on May 31, 1906 (see printed record, p. 5), another action of the same character was brought to recover a penalty of one hundred dollars ($100.00) for another alleged violation of the same act.

II.

These two suits were consolidated for trial (see record, p. 9), and were treated by the court as one suit on four counts. (See record, p. 11, supplemental transcript; opinion of the Circuit Court of Appeals, p. 5.)

III.

The issues were joined in said consolidated case and came on for trial in the district court of the United States for the District of Nebraska, on October 3, 1907, before the court and a jury. (p. 9.)

On October 5, 1907, each party moved the court for a judgment in its favor upon the undisputed facts. (p. 77.)

The court overruled the motion of petitioner, sustained the motion of respondent (p. 79), and directed a verdict of guilty against petitioner for the several violations charged in the several counts of the consolidated case, and entered judgment against petitioner for $400.00 and costs. (p. 11.)

IV.

Your petitioner prosecuted a writ of error from said judgment to the United States Circuit Court of Appeals for the Eighth Judicial Circuit (p. 19 *et seq.*), said cause being entitled in said Circuit Court of Appeals: No. 2787, Chicago, Burlington & Quincy Railroad Company, plaintiff in error v. United States of America, defendant in error.

V.

The Circuit Court of Appeals for the Eighth Circuit, in

its opinion in said case (supplemental transcript, p. 5), filed in said court on April 24, 1909, affirmed said judgment against your petitioner.

VI.

A certified copy of the entire record of the said cause in the said Circuit Court of Appeals for the Eighth Circuit is herewith filed and made a part of this application, in conformity with rule 37 of this Honorable Court.

VII.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals for the Eighth Circuit, in said cause, is erroneous in the following particulars:

1. The penalty provided by section 6 of the safety appliance act of 1893, as subsequently amended, is enforced against petitioner on the theory that the statute in question imposes an absolute duty which was not discharged by the exercise of reasonable care and diligence by your petitioner; notwithstanding that it appears without dispute, in the record, that your petitioner did not know the cars found defective were in fact out of repair, and had no intention to violate the law, but to the contrary, said cars were properly and lawfully equipped, and petitioner exercised reasonable care to keep them in repair by inspections thereof.

2. The United States Circuit Court of Appeals for the Eighth Circuit held that in prosecutions to recover the penalties provided by the act, your petitioner is not entitled to the application of those principles enforced in all courts in actions brought by the Government to inflict and collect statutory penalties for alleged violations of law, and held, by necessary implication, that the safety appliance act is not of a criminal

nature, because this particular action in its form "is a civil action in the nature of the action of debt to recover a penalty;" although the statute in sections 1, 2 and 4 thereof declares that the failure to equip cars as therein commanded *"shall be unlawful,"* and section 6 thereof imposes upon common carriers "using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car *in violation* of any of the provisions of this act * * * * *a penalty* of one hundred dollars *for each and every such violation."* And the said court of appeals affirmed the verdict of "guilty" directed by the district court, although petitioner was at the times of the alleged offenses using reasonable care and diligence to maintain its equipment at the statutory standard and had no intention to violate the safety appliance act.

The United States Circuit Court of Appeals for the Eighth Circuit declined to adjudge the point in harmony with the opinion of the United States District Court for the Western District of Kentucky in *United States v. Illinois Central Railway Co.*, 156 Fed. 182, and with the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in *St. Louis, Iron Mountain & Southern Ry. Co. v. Delk*, 158 Fed. 931, and declined to recognize the established principle that *"an action to enforce a penalty, whatever may be its form, is one of a criminal nature,"* as declared by Mr. Justice BREWER *in State of Iowa v. Chicago, Burlington & Quincy R. R. Co.*, 37 Fed. 497, and as held by this court in *Coffey v. United States*, 116 U. S. 436; *Boyd v. United States*, 116 U. S. 616; *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265; and *Counselman v. Hitchcock*, 142 U. S. 547; and erroneously based its opinion and judgment in this case upon the language of this court in *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 291, which was a suit brought by

an injured employe of a railway company who claimed therein the benefit of the act in his own behalf, but which decision of this court does not involve the question here raised nor contain a construction of the safety appliance act as the same relates to the right of the United States to enforce the penalties therein provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court on a date to be therein designated, a full and complete transcript of the record of said circuit court of appeals in the said cause therein entitled *Chicago, Burlington & Quincy Railway Co., Plaintiff in error, v. United States of America, Defendant in error,* 2787, to the end that the said cause may be reviewed and determined by this court as provided by law, and that the said judgment of the said United States Circuit Court of Appeals for the Eighth Circuit, in said cause, and every part thereof, may be reversed by this Honorable Court, and that the judgment of the district court of the district of Nebraska be reversed and a judgment entered for your petitioner.

And your petitioner will ever pray.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE

Attorneys for Chicago, Burlington & Quincy Railway Company,
Petitioner.

STATE OF NEBRASKA } ss.
COUNTY OF DOUGLAS }

Ralph W. Breckenridge being duly sworn, says he is one of the attorneys for the Chicago, Burlington & Quincy Railway Company the petitioner for a writ of certiorari and is authorized in behalf of said petitioner to verify same; that he has read said petition and the same is true ot his own knowledge except such matters are therein stated upon belief and such he believes to be true.

RALPH W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 18th day of August, 1909.

{ Notarial Seal }

W. H. HATTEROTH,
Notary Public
Douglas county Nebraska.

SUPREME COURT OF THE UNITED STATES

CHICAGO, BURLINGTON AND QUINCY
RAILWAY COMPANY,
PETITIONER,

v.

UNITED STATES OF AMERICA
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
ATTORNEYS FOR PETITIONER.

The importance of the question involved in this suit cannot be measured by the amount of the judgment sought to be reversed.

No employe of petitioner was injured through the defects found by the Government inspectors, and the first point stated in the petition, depends upon the construction of the safety appliance act and a judicial determination of the extent of the duty of railroads, under the statute in question, to maintain their car equipment in perfect condition against the unpreventable and the unforeseeable hazards of use. In other words, whether as between the United States and the railroads, the

statute creates an obligation which is thus stated by the United States Circuit Court of Appeals in its opinion in this case:

"The duty of railroads under the statute in question *is an absolute* duty, and not one which is discharged by the exercise of reasonable care or diligence."

Is the act susceptible of the construction that it is not a penal statute or criminal law? Only by that construction can the intention of the accused be eliminated as a factor in a proceeding to inflict the penalty for a technical violation of the statute, when, as a matter of fact, the accused had no knowledge that the statutory requirements were not complied with, and when, also, it was using reasonable care and diligence to comply with the act and keep its rolling stock, which was of the character prescribed by the act, in repair.

The conviction of your petitioner of violation of the safety appliance act and the assessment against it of the penalties prescribed in section 6 thereof upon the facts presented by this record, involves a principle far-reaching and revolutionary, for it is a successful attack on the ultimate theory upon which our social compact is based.

A correct decision in this suit does not necessarily depend upon the power of Congress to abrogate the common law remedies of railway employes against their employers, and the substitution therefor of what is practically an insurance against the hazards of a dangerous business and a provision for a sure indemity against injuries received therein. But no final construction of this act ought to be made until after a full and free discussion of the questions which arise concerning it.

The United States Circuit Court of Appeals for the Eighth Circuit, in *United States v. Atchison etc. Ry Co.*, 163 Fed. 517; *United States v. Denver & Rio Grande Ry. Co.*, 163 Fed. 519; *Chicago, Milwaukee & St. Paul Ry. Co. v. United States*, 165

Fed. 423, and in the case at bar, ground the enforcement of penalties for the violation of what is assumed to be the absolute duty of the railway companies under the safety appliance act regardless of their intention or the care exercised by them, upon a misconception of the scope of certain language used by Mr. Justice MOODY in *St. Louis, Iron Mountain and Southern Ry. Co. v. Taylor*, 210 U. S. 291; which language was not necessary to the decision of that suit and which neither stated nor discussed the liability of railway companies to the Government, nor the conditions under which the penalties prescribed in the act can be recovered by the United States, nor whether, in actions by the Government against the companies, the exercise of reasonable care is a defense; but the learned justice discussed solely the extent of the new legal relation between master and servant which he asserts was created by congress.

In *St. Louis & San Francisco Ry. Co. v. Delk*, 158 Fed. 931, the United States Circuit Court of Appeals for the Sixth Circuit, said:

"It is urged that, if the courts fail to give the statute the construction that it imposes an absolute duty, it defeats the purpose of Congress in enacting it, and leaves the obligation of the carrier as vague as before. But we see no reason for this contention. The benefit of the equipment of the cars with that kind of 'safety appliances' and the maintenance thereof, which, as we think, was the purpose of the law, is secured. The question about which the difference arises is simply whether, in addition to supplying and maintaining the appliances, the carrier is absolutely bound to insure their constant good order, or whether it is bound only to the extent of its best endeavor. The question whether it has fulfilled its duty in the latter respect is no more difficult of determination than such as are constantly arising in cases where negligence is charged in other conditions."

Elsewhere in the opinion the court said:

"Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair."

In that case the reasonable care and diligence of the railway company to maintain its coupling appliances according to the prescribed standard, was recognized as a valid defense. Other federal courts have held to the contrary, and your Honors have allowed the writ of certiorari to review that decision.

All of the decisions to the contrary of the views expressed in the *Delk* case rest for their authority, not upon any independent reasoning, but upon the unjustified application of the language of this court in the *Taylor* case, which, as already shown, dealt with a different situation from that presented in the case at bar; and that decision ought not to be extended to cover an assessment of penalties against the railway companies—a wholly different cause of action than that which Taylor had—without giving counsel for the railway companies who may be concerned, an opportunity to be heard and to present to this court the reasons why such drastic and unusual procedure should not be permitted to the Government in the recovery of statutory penalties.

The United States Circuit Court of Appeals for the Eighth Circuit deny the validity of what they say is *an argument drawn from the assumed criminal character* of the proceeding against the railroads authorized by the safety appliance law.

We quote from their opinion:

"It is argued that no criminal offense can be committed when

no injury has befallen anyone or when there is no intent to do the act constituting the offense and that no such offense can be established by construction. Whether these positions are maintainable as abstract propositions of law or not, concerning which we express no opinion, they have no application to the present case. This is not a criminal case. It is a civil action in the nature of the action of debt to recover a penalty, which Congress in its wisdom saw fit to impose upon railroads."

Manifestly the view of the Circuit Court of Appeals stated in the language quoted, is widely at variance with a long line of decisions of this court. A penalty is none the less a penalty, and a statute which imposes it is none the less a penal or criminal statute, because the penalty may be recovered in an action which is civil in its form. The difference between the civil and criminal prosecution of corporations is too slight to take cognizance of. An officer of a corporation may be indicted in his individual capacity for corporate offenses, but the corporation itself is not subject to the personal punishment inflicted upon individuals, and can be punished only by fine or the loss of corporate privileges and power.

In *United States v. Illinois Central Ry. Co.*, 156 Fed. 182, the United States District Court for the Western District of Kentucky, held this act a criminal law, and all violations of its provisions in a broad sense to be crimes or misdemeanors.

In *Huntington v. Attrell*, 146 U. S. 657, 668, your Honors held:

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*.' The former are an infringment or privation of the private or civil rights belonging to individuals,

considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*."

It is not material whether the action brought by the United States District Attorney for the District of Nebraska, is in its form criminal or civil. Let it be conceded to be in form, a civil action. The question involved goes beyond the mere form of the action and relates to the nature of the statute and the rights of respondent thereunder; for the issue is whether even the United States, in a civil action, can enforce a penalty against a railway company for the violation of an act of Congress, when the company is at the time in the exercise of reasonable care and diligence and not only is without the intention to violate the statute, but is trying by the use of ordinary and reasonable care not to violate it.

In *Boyd v. United States*, 116 U. S. 616, 634, this court, speaking through Mr. Justice BRADLEY, said of certain procedure under the customs revenue laws, which provided for penalties by forfeiture and fines:

"If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—*can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens,* and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey v. The United States*, ante, 436; in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of

goods, arising upon the same acts. *As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature,* we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendent of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

In *State of Iowa v. Chicago, Burlington & Quincy R. R. Co.*, 37 Fed. 497, the question was whether an action to recover penalties alleged to have incurred under the provisions of an act of the legislature of Iowa entitled "An Act to regulate the railroad corporations, etc." was removable as a civil case, and Mr. Justice BREWER held that *though that suit was civil in form it was not "of a civil nature"* which would permit it to be removed to a federal court. The learned justice said that he had "given this subject long and patient examination" in view of the vast interests affected and the importance of the question, and against his first impressions he had been forced to the conclusion he announced. His opinion is a comprehensive statement of the principle and the authorities upon which it rests. He cites *Boyd v. United States, supra,* and refers to the fact that in a separate opinion the late Mr. Justice MILLER said:

"I am of the opinion that this is a criminal case within the meaning of the * * * * Fifth Amendment of the Constitution of the United States."

He likewise refers to the decision of this court in *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, which your Honors held to be a technical fine by way of punishment for an offense committed by the insurance company against the statute upon which that suit was based; and Mr. Justice BREWER summed up the whole of his research in the following language:

"It must be adjudged that in the opinion of the Supreme Court

of the United States, the ultimate authority on questions of this kind, *an action to enforce a penalty, whatever may be its form, is one of a criminal nature.*"

Similar views are stated in *Counselman v. Hitchcock*, 142 U. S. 547.

Petitioner insists that in actions to enforce the penalties prescribed by the safety appliance act, it has the right to interpose the same defenses that are permissible in any other criminal or quasi-criminal proceeding.

In *United States v. Illinois Central R. Co.*, 170 Fed. 542, the Circuit Court of Appeals of the Sixth Circuit reversed the judgment below upon the ground that the Government, in an action to recover penalties under the safety appliance act, is not required to prove the guilt of the respondent beyond a reasonable doubt, for a mere preponderance of the evidence is sufficient. But that court adheres to the views to which it gave previous expression in the *Delk* case; and though the Government may recover (if a preponderance of the evidence shows the guilt of the accused), the penalties fixed by the safety appliance act, *by a suit civil in form*, the Court of Appeals of the Sixth Circuit declined to assent to the contention of counsel for the Government (the same counsel argued the instant case in the Circuit Court of Appeals for the Eighth Circuit), that the view of that court with respect to the measure of the duty imposed upon the railroad company stated in the *Delk* case had been overruled by the opinion of this court in the *Taylor* case. We quote from the opinion in the case now cited:

"But expressions of opinion as to how the law would be upon facts essentially different from those in issue are not controlling in another case when such different facts and issues are presented. These rules have been declared on many occasions by the Supreme Court itself, and no appellate tribunal has more strongly emphasized them.

* * * * In the case of *St. Louis, etc. Ry. Co. v. Taylor, supra*, the suit was an action to recover damages for a personal injury, and not a penal action such as is provided by section 6. It was founded upon the provisions of those sections of the act which relate to the subject of equipping the cars, and was not a prosecution for the use of such cars."

And though the court apparently is in accord with the Circuit Court of Appeals of the Eighth Circuit in ruling that "the procedure, the pleading, the evidence, and the review of the proceedings are to be such as are incident to an action of debt," it is not in accord with the views we seek to review here, for the opinion proceeds:

"*A question of much importance remains, which is whether, the offense being penal, the court is not to have regard to the constituents of the offense itself, and determine its quality by the tests of the criminal law. In other words, does the mere fact that the remedy is a civil action relieve the government from proving that the offense charged was criminal in its nature, and, specifically, was committed in willful neglect of the duty prescribed by law?*"

And the rulings of the court are expressed in the fifth and sixth paragraphs of the syllabus as follows:

"An interstate railroad is guilty of violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. Stat. 1901, p. 3174), if it starts in transit a car containing interstate commerce with a defective coupling which could have been discovered by inspection, but not so, if the car when started had no discoverable defect, but developed one in transit, and there was no subsequent lack of diligence either in discovering or repairing the same."

"Where, in an action against an interstate railroad for violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), the government proves that a car laden for interstate traffic and with defective couplings has been hauled on defendant's tracks, the bur-

den is then shifted to defendant to prove exculpatory facts, namely, that it has used all reasonably possible endeavor to discover and correct the fault."

The court also say:

"*It seems clear to us that Congress*, having accomplished its purpose by requiring carriers to equip their cars in the manner prescribed and to continue such equipment, *was content to leave the incidents of their use to be regulated by the rules and principles of the common law.* * * * * Accidents will happen, and at places more or less remote from places of repair, or where the car cannot be left upon the track without peril to the public as well as to the employes. Undiscoverable defects may at any time appear while the car is moving on the track in a train, and it has been hauled in that condition before it can be known. We are not prepared to believe that Congress intended to impose a law upon a business of public utility which cannot be carried on without more or less frequent violations of such law, and to fasten thereon a liability to prosecution as for a crime or misdemeanor."

There is, therefore, a sharp conflict of opinion between the federal appellate courts of the Sixth and Eighth Circuits on the precise question presented by the record herein.

The rule stated by this court in *Forsyth v. City of Hammond*, 166 U. S. 506, justifies this application and requires the exercise of the power of this court to issue the writ of certiorari herein; and upon consideration of the questions presented, which are new and important, your Honors should determine whether or not an act of Congress which professedly was enacted to lessen the hazards of railroad service, shall be used by a department of the United States Government as an instrument of oppression and tyranny.

Respectfully submitted,

CHARLES J. GREENE and
RALPH W. BRECKENRIDGE,
Attorneys for Petitioner.

Omaha, September 1, 1909.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE CHICAGO, BURLINGTON AND QUINCY Railroad Company, petitioner, *v.* THE UNITED STATES. } No. 602.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES ON THE PETITION.

STATEMENT.

This is a petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that court affirming a judgment for the United States in the district court in an action to recover penalties for violations of the safety-appliance act (27 Stat., 531; amended, 29 Stat., 85, 32 Stat., 943).

The sole question is whether the duty imposed upon a railroad company by the safety-appliance act is at all times absolute in character or whether after the carrier has provided the prescribed ap-

pliances its liability depends upon a failure to exercise reasonable diligence in keeping such appliances in repair. The trial court ruled that the facts that the carrier did not know that the automatic couplers were out of repair and had used reasonable care in inspecting them did not excuse the defendant. This ruling the Circuit Court of Appeals for the Eighth Circuit affirmed, and the defendant now petitions this court for a writ of certiorari.

Although the Government is of the opinion that the Taylor case (210 U. S., 281) decided that the duty of a carrier under the safety-appliance act is absolute, it does not oppose this petition for the reason that there is some conflict of opinion between the Circuit Courts of Appeals for the various circuits.

In the Second, Fourth, Seventh, and Eighth circuits the position of the Government as to the duty of the carrier under the safety-appliance act has been upheld in the following cases:

Donegan v. *Baltimore & N. Y. Ry. Co.* (165 Fed., 869), Second Circuit.

Atlantic Coast Line R. R. v. *U. S.* (168 Fed., 175), Fourth Circuit.

Chicago Junction Ry. v. *King* (169 Fed., 372), Seventh Circuit.

U. S. v. *A., T. & S. F. Ry.* (163 Fed., 517), Eighth Circuit.

U. S. v. *Denver & Rio Grande R. R. Co.* (163 Fed., 519), Eighth Circuit.

C., M. & St. P. v. *U. S.* (165 Fed., 423), Eighth Circuit.

U. S. v. *So. Pacific Co.* (169 Fed., 407), Eighth Circuit.

C., B. & Q. R. R. v. *U. S.* (170 Fed., 556), Eighth Circuit.

On the other hand the Circuit Court of Appeals for the Sixth Circuit in a case decided before the Taylor case (*St. Louis & San Francisco Railroad Co.* v. *Delk*, 158 Fed., 931) held that the law requiring an interstate railroad company to equip its cars with automatic couplers only imposes upon the carrier the duty of using reasonable care to keep the couplers in repair after the cars have been properly equipped. That action was between a railroad and its employee.

In *United States* v. *Illinois Central Railroad Co.* (170 Fed., 542, 551), a decision rendered after the Taylor case, the Circuit Court of Appeals for the Sixth Circuit took occasion to state its adherence to the doctrine of the Delk case, and said that the court was agreed that the Taylor case had not overruled that case.

The Delk case is now before this court on a writ of certiorari (No. 277, October term, 1909), and the court has granted the United States leave to be heard on the final hearing. Accordingly, it is respectfully submitted that if the petition for a writ of certiorari in this case be granted the case should be heard with the Delk case.

LLOYD W. BOWERS,
Solicitor-General.

OCTOBER, 1909.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1910.

No. 329.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, PETITIONER,

v.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
ATTORNEYS FOR PETITIONER.

STATEMENT OF THE CASE.

This suit involves the construction of the Federal Safety Appliance Act, c. 196, 27 Stat. 531, as amended by the subsequent acts of April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. Stat. 1901, p. 3174), and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. Stat. Supp. 1907, p. 885).

The Government seeks to recover penalties for violations of the act, growing out of the mere failure to maintain the pre-

scribed equipment on the cars in question, although no person was injured by reason of such failure and although the railway company was, at the time, according to the undisputed evidence, using reasonable care to maintain the safety appliances with which the cars were equipped, at the standard dictated by the act.

There are two suits, in one of which three separate violations are complained of and one in the other; but the two were consolidated for the purposes of trial and, by stipulation, for the purposes of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, were treated by the parties and by the court as one suit with four counts.

The construction of the safety appliance act insisted upon by the Government in its own behalf, and adopted by the United States District Court for the District of Nebraska, and the United States Circuit Court of Appeals for the Eighth Circuit, imposes upon railway companies engaged in interstate traffic, the absolute obligation, regardless of the incidents and accidents inseparably connected with the movement of freight trains, *to keep* the safety appliances with which their cars are required to be equipped, *in a perfect state of repair;* and this obligation is asserted to be absolute as between the Government and the railway company, notwithstanding that the company did not know its cars were out of repair and had no actual intention at the time to violate the law, but, on the contrary, exercised reasonable care to keep them in repair by the usual inspections. In other words, that the penalty for the violation of this penal statute can be recovered regardless of knowledge or intent, though the proof shows that the railway company was in the exercise of reasonable care to avoid the very conditions complained of.

The question involves more than a construction of the safety appliance act; it involves more than the protection through the use of the prescribed equipment, of the safety of employes and travelers upon railroads—it involves the integ-

rity of the social compact and the right of the people of these United States to the enjoyment of those liberties which have been theirs during the whole period of our constitutional government.

With these preliminary observations we invite your Honors' attention to

The Facts Upon Which This Controversy Rests.

There is no question but that each of the cars which it is alleged were moved in interstate traffic in violation of the safety appliance act, was equipped with appliances of the prescribed character; but it is contended that in each instance these cars were hauled when the appliances were out of order in some particular; that is to say, the coupling and uncoupling appliance on the "A" end of the K. C. F. S. & M. coal car No. 13567, which was moving in interstate traffic on one of the company's lines, was out of repair and inoperative, because "the chain connecting the lock-pin or the lock-block to the uncoupling lever" was broken; that the coupling and uncoupling apparatus on the "B" end of C. B. & Q. coal car No. 80263, which petitioner was moving in interstate traffic over one of its lines, was out of repair and inoperative, because "the chain connecting the lock-pin or lock-block to the uncoupling lever" was disconnected; that the coupling and uncoupling apparatus on the "B" end of C. B. & Q. coal car No. 86192, which petitioner was moving in interstate traffic over its lines of railway, was defective, because "the grab-iron or hand-hold was missing from the right hand side of the 'B' end of said car"; and that the coupling and uncoupling apparatus on the "A" end of N. P. car No. 6754 was out of repair and inoperative. The petition of the Government (p. 5), does not state how the coupling and uncoupling apparatus on this car was out of repair and inoperative, but at the trial the special counsel for the Government stated that the trouble with that appliance was that "the little pin which passes through the clevis-pin let the clevis-pin out, and the clevis was gone, so that there was

no connection, in that case, between the lever and the lock-pin or lock-block". (p. 22.)

These are in detail the defects of which the Government complains and they are comprehensively described by Judge ADAMS, who wrote the opinion of the Circuit Court of Appeals, as "insufficient coupling appliances or insufficient grab irons or hand holds". *Chicago, B. & Q. Ry. Co. v. United States*, 170 Fed. 556.

The evidence tended to prove the defective condition of the apparatus on each of the four cars, as charged and stated; *but no person was injured thereby nor was any complaint made by any employe* of any threatened injury or of any danger encountered because of the existence of the particular defects.

The United States has prosecuted this action to recover penalties payable to itself, upon the theory that the statute creates an absolute duty which must be observed at all hazards and under all circumstances, whether as to employes or the Government; and that it has all the rights in the matter of recovering penalties that an injured employe might claim if he were injured through the failure of the railway company to equip its cars and those which it hauled as the safety appliance act requires, and to maintain such equipment in perfect condition.

The railway company denies liability to the United States, because it not only exercised due care to provide the prescribed equipment, but because in each instance these cars became out of order while they were being moved from one division and repair point, where the cars were carefully overlooked and inspected, to another division and repair point, where, in each case, the trains, as they came in, were boarded by the government inspectors, and where the reports, upon which these actions were brought, were made, without giving the railway company reasonable opportunity to put the several cars in such repair as to obviate the criticisms of the government

inspectors and to bring each of them up to the standard established by Congress.

The two C. B. & Q. cars, 86192 and 80263, were being hauled from Tyrone, Iowa, to Omaha, loaded with coal. These cars came into the Omaha yards on the morning of August 9, 1905, (pp. 30-32), and were inspected in the Gibson yard at 7:30 o'clock in the morning of that day. The Gibson yard is really a part of the Omaha yard, and the cars in trains coming into the Gibson yard are distributed at Gibson to the freight house at Omaha, or where they are to be unloaded. (p. 36.)

These two cars were, at the same time, inspected by a Burlington inspector and marked: "Bad Order, Repair Track When Empty". (p. 41.) *This inspection* was performed soon after the arrival of the cars, and was stated by Mr. Wright, the inspector and witness for the Government, to have been made "*within a reasonable time*". (p. 41.)

It was stipulated that "both of these cars were received in Omaha on or about August 9, 1905", (p. 24), and had been hauled over petitioner's line of railroad from Tyrone, Iowa, from which point they would necessarily pass through Creston, Iowa, which is the last repair point on the Iowa lines before reaching Omaha, and which, as the court judicially knows, is about one hundred miles east of Omaha.

The railway company produced its foreman of car inspectors at Creston, who had been in its employ there for 37 years, and who thus described the nature of the work he has charge of at that place:

"Q. Now whose business is it to inspect cars that go through Creston?
A. Well I got four inspectors on duty, that is, they do the inspecting.

Q. Do you, yourself, make inspections of cars?
A. I do some, when the trains arrive, but generally I go through the yards and if there is anything which needs attention—

Q. Your duties are more in the direction of superintending the repairs, are they?

A. Yes, I am looking after that the work is done.

Q. You are the foreman, in other words, of the inspection and repair crew?

A. Yes, that is, light repairs in the yard.

Q. Such as can be made in the yards?

A. Yes.

Q. Now what examination is made in the yards at Creston of freight cars going through towards the west?

A. Well, we inspect them for the safe running, so the cars are safe to haul, to run.

Q. And what inspection do you make of the coupling apparatus?

A. Well we make inspection of that also, and if we find any of these small articles like a lifting clevis, and pins, we will make the repairs right there in the yard.

Q. At Creston?

A. Yes, sir.

Q. You have some repair shops at Creston?

A. Yes, sir.

Q. And you keep on hand a supply of repairs?

A. Oh, yes, keep all these, I got two places in the yards, one at each end of the yard, to make it a little more handy for them small supplies.

Q. Now are all the cars examined?

A. Every car is inspected that comes in the yard, on its arrival.

Q. Now were you in charge of the inspection, the work of inspecting over there, we will say from the 1st to the 5th or 8th or 9th of August, 1905?

A. I was.

Q. And were you personally seeing to it that the work of inspecting was being done?

A. Well, yes, I am, I am there from 7 o'clock to 6 o'clock in the evening, and I got a foreman at night.

Q. Now what is the practice or custom in that yard about making entries, or about making the record of defective cars?

A. Why we keep no record of defective cars except what needs repairs, we mark them 'bad order' and set them over to what we call the 'rip' track.

Q. But don't you have a book in which you put the number of the cars that are marked in bad order, or needing repairs?

A. No, we use chalk and cards both.

Q. But you have some record, don't you, of the cars that go through that need repairing?

A. The shop does that, they keep a record of every car that comes over there on the rip track where they make repairs, they take the number when the car gets on the rip track and when it leaves the rip track.

Q. What do you mean by the rip track?

A. That is the repair track.

Q. Mr. Freytag, I show you a book here which I will have identified a little later, and ask you what that book is?

A. That is the car shop record of cars repaired; it is all there when they go into the shop and when they went out.

Q. Now then as to all other cars that don't go to the shop and are not repaired there, they are carded are they, 'bad order'?

A. Carded 'bad order', and sent over to the shop.

Q. And then all cars that do not go into the shop that need repairs are repaired right on the track there?

A. Yes, right on the track.

Q. That is, small repairs that can be made *on* a very few minutes?

A. Yes, sir.

Q. You have no personal recollection, Mr. Freytag, have you, of two coal cars, No. 86192 and No. 80263?

A. I haven't, no.

Q. And if those cars had been repaired by you, or by anybody else in that yard, the repair would either have been put on on the track or else sent to the shop?

A. Yes, if they were repaired at the shop the shop would have a record; if they were repaired in the yard, I never keep no record in writing *or* these little clevis and clevis pins.

Q. But the custom and practice of your crew there is to make those repairs where they are needed and to inspect all cars?

A. Yes, immediately, at Creston.

Q. Now where is the next repair point this side of Creston?
A. That is at Omaha." (p. 58 *et seq.*)

On his cross-examination he testified that the cars were carefully inspected at Creston; those that were out of repair, were repaired; and he had no record that any repairs were necessary on either of the two coal cars.

He admitted a fact which ought to have recognition in such a case as this, that "no person living can say that he is perfect". (p. 62.) But his testimony establishes that the defective condition of these appliances which, but for the defects, complied with the federal statute, was due to the breakage and the wear incident to the movement of the cars between Creston and Omaha.

The general foreman for the Burlington company testified that the car repair tracks had been located at Gibson since November, 1906 (p. 63); that prior to that time they were located at the Douglas street yards, at which time the Douglas street repair track ran almost to the Douglas street crossing; that Gibson is about a mile and a half from the Douglas street yard.

The two cars, 80263 and 86192, *were repaired on August 9, 1905.* This witness also testified that the first repair station east of Omaha in August, 1905, was at Creston. (p. 64.)

The Northern Pacific car, No. 5764, was an empty car, not in use by the Burlington railway, going home to the Northern Pacific. It was inspected at Seneca, Nebraska, which is one of the division stations between Ravenna and Alliance, by an inspector who got up at 6:40 on the morning of January 26, 1906. This car was hauled to Alliance, about 100 miles west of Seneca, and was found to be in the same condition early in the morning of the next day as when seen by this inspector and his comrade. (pp. 53 to 56.)

At Ravenna, which is east of Seneca and reached by the train in which this car was moved, before its arrival at Seneca,

there is a crew whose business it is to inspect and repair all cars; and the foreman of that crew, who had been in the service of the company for seventeen years at that point, testified that the custom and practice of the company, both by himself and the men working with him, was to inspect all the cars in all the trains passing through there, and that defective cars were repaired and a record made of such action. By the system in vogue, any car that was inspected and found not to need any repairs in Ravenna would have nothing against it: by that is meant there would be nothing recorded in respect to that car. These inspectors work both day and night and cover both passenger and freight trains. (pp. 71, 72.)

The books of the inspection department were examined, and nothing was found therein with respect to this Northern Pacific car. That this car was in good condition when it reached Ravenna, is otherwise established, because it was overhauled and repaired at the Burlington repair shops at Wymore, Nebraska. Wymore is south of Lincoln about 60 miles, (p. 66), and Ravenna is about 120 miles from Lincoln. The repairs which were put on this car only a few days before, are shown on page 67 of the record. The only thing missing from this car was a clevis-pin, which is a very small thing and likely to be displaced whilst running.

It was upon these facts that the judges of the Circuit Court of Appeals found:

> "It appears from the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law, but, on the contrary, had exercised reasonable care to keep them in repair by the usual inspections." 170 Fed. 557.

At the close of the trial the Government and the railway company each moved for a peremptory instruction in its favor; but the learned district judge being of the opinion that any defect in the appliances, wherever it appeared, and regardless of how it was produced, was sufficient to convict the

railway company, instructed the jury to return a verdict for the Government, and pursuant to that direction they returned a verdict of GUILTY on each cause of action. (pp. 10, 11.)

The verdicts were not in the form of verdicts in civil actions; they assessed no damages; they fixed no amount of recovery, but like the verdicts in any other criminal case, and by the direction of the court, the verdict returned was *"Guilty in manner and form as charged"*; though the judgment was a money judgment for the penalty fixed by the statute. We call attention to this mixture of civil with criminal procedure.

The railway company sought to have the judgments entered upon the verdicts, reversed; and assigned in the United States Circuit Court of Appeals and assigns here, the following

Specifications of Error:

I.

The court erred in sustaining the motion of the plaintiff at the close of the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on K. C. F. S. & M. coal car No. 13567, involved in count one of the suit docketed in the United States District Court as "O-31."

II.

The court erred in instructing the jury with reference to said K. C. F. S. & M. coal car No. 13567, as follows:

> "The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support each count in the petition, provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute declares an offense, whether the act denounced by the statute is knowingly committed or not, then the case is sufficient

upon the undisputed evidence to require a verdict in favor of the Government.

There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclusion that knowledge is not an element of the offense under the statute." (76.)

III.

The court erred in instructing the jury with reference to said K. C. F. S. & M. coal car No. 13567, as follows:

"It seems to me that, Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that therefore the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employees, provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment." (77, 78.)

IV.

The court erred in overruling motion of defendant at the close of all the evidence to instruct the jury to return a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 80263, involved in count two of the suit docketed in the United States District Court as "O-31."

V.

The court erred in sustaining the motion of the plaintiff at the close of the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 80263, involved in count two of the suit docketed in the United States District Court as O-31.

VI.

The court erred in instructing the jury with reference to said C. B. & Q. coal car No. 80263 as follows:

> "The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support each count in the petition, provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute declares an offense whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict in favor of the Government.
>
> There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclusion that knowledge is not an element of the offense under the statute." (76, 77.)

VII.

The court erred in instructing the jury with reference to said C. B. & Q. coal car No. 80263 as follows:

> "It seems to me that Congress having the power to make certain acts an offense regardless of knowledge, and it having failed to make knowledge an element by express words in this act it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that therefore the failure to include knowledge as an element of the offense

must have been present in the mind of the enacting body. Its omission was intentional in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employes, provided the accident occurs from a defective appliance as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment." (77, 78.)

VIII.

The court erred in overruling motion of defendant at the close of all the evidence to instruct the jury to return a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 86192, involved in count three of the suit docketed in the United States District Court as "O-31".

IX.

The court erred in sustaining the motion of the plaintiff at the close of the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on C. B. & Q. coal car No. 86192, involved in count three of the suit docketed in the United States District Court as "O-31".

X.

The court erred in instructing the jury with reference to said C. B. & Q. coal car No. 86192 as follows:

"The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support each count in the petition, providing it is not neces-

sary that the carrier shall knowingly offend against the statute. If the statute declares an offense, whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict in favor of the Government.

There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclusion that knowledge is not an element of the offense under the statute." (76, 77.)

XI.

The court erred in instructing the jury with reference to said C. B. & Q. coal car No. 86192 as follows:

"It seems to me that Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that therefore the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employes, provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment." (77, 78.)

XII.

The court erred in overruling the motion of the defendant at the close of all the evidence to instruct the jury to return a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason

of an alleged defect in the safety appliance on Northern Pacific car No. 5764, involved in the suit docketed in the United States District Court as "O-88."

XIII.

The court erred in sustaining the motion of the plaintiff at the close of all the testimony for a verdict in its favor upon the cause of action asserted by the United States of America and against the Chicago, Burlington & Quincy Railway Company for a penalty accruing by reason of an alleged defect in the safety appliance on Northern Pacific car No. 5674, involved in the suit docketed in the United States District Court as "O-88."

XIV.

The court erred in instructing the jury with reference to said Northern Pacific car No. 5764, as follows:

> "The facts showing a violation of the Act of Congress relating to safety appliances are sufficient to support each count in the petition, provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute declares an offense, whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict in favor of the Government.
>
> There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclusion that knowledge is not an element of the offense under the statute." (76, 77.)

XV.

The court erred in instructing the jury with reference to said Northern Pacific car No. 5764, as follows:

> "It seems to me that, Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the

contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that therefore the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employes, provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment." (pp. 77, 78.)

ARGUMENT.

Can the Government Recover the Penalties Fixed by the Safety Appliance Act for its Violation, When it is Shown not only that the Railway Company Did Not Know that its Cars Were Defective Tested by the Act, and that There Was no Intention to Offend; but that the Company Exercised Reasonable Care to Keep its Cars Repaired, by Inspecting Them in the Usual Way at the Last Place Where They Could Have Been Either Inspected or Repaired, Before the Government Inspectors Found Them Out of Repair?

The basis of the decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case, and the decisions of the same and other courts referred to in its opinion in this suit, is certain language used by Mr. Justice Moody in *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281. That case required this court to review the judgment of the supreme court of Arkansas, wherein was involved a construction, claimed to be erroneous, of the safety appliance act, in an action for the death of an employe alleged to have been caused by the railway company's negligence.

The liability of railway companies *to the Government*, whether or not they comply with the terms of the act, is not

therein discussed and was not involved; but the discussion of the facts in that case related specifically to the statement of the new legal relationship between master and servant, which the learned justice asserts was created by Congress in the safety appliance act. Whether or not all that the court said was necessary to a decision of the case then before the court, it is certain that it was intended to apply only to the relation of master and servant, and ought not to be interpreted otherwise nor in any event applied, to other situations. We quote from the opinion:

> "We need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employe reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. *In the case before us the liability of the defendant does not grow out of the common-law duty of master and servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute.* We have nothing to do but ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. *The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty,* deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and *there arises from that violation the liability to make compensation to one who is injured by it.*"

In *St. Louis & S. F. R. Co. v. Delk,* 158 Fed. 931, now pending in this court (No. 88), upon a writ of certiorari and for hearing with the instant case, the view was expressed, that even in an action between a railway company and one of its

employes, the exercise of reasonable care to maintain the safety appliances at the standard prescribed by Congress, is a defense, and the existence of an absolute and unqualified duty was denied. On this point the Circuit Court of Appeals of the Sixth Circuit said:

> "The railroad company contends that it had complied with its duty if it had equipped the car with the prescribed coupling apparatus, and kept it so equipped, and had used due diligence in endeavoring to keep it in good order. It may be admitted that upon a casual reading of the statute it might be that the impression would be taken that the duty is absolute and without any qualification by the circumstances. The court below gave the law to the jury by stating the language of the statute, and in such a way as to lead the jury to suppose that it imposed an absolute duty to keep the car in order, and applied to the circumstances of the case on trial. But the duty of the court goes deeper than this, where the statute, in order to be understood, requires construction. It is bound to consider the conditions to which the statute applies. And if it is seen that in its practical application doubts and difficulties arise, it becomes its duty to scrutinize the statute, and resolve whether, by a sensible construction of it, those difficulties may be avoided. Being bound to administer the law, it is obliged to determine what the law really means and explain it to the jury."

The court thereupon referred to the purpose to be accomplished by the act, which is that stated in its title:

> "The general purpose is to promote the safety of employes and travelers; but the immediate purpose of the act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplings. *The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment.* The safety of employes, etc., is the thing beyond, an expected result of the enactment, which latter is the substantive thing before us for interpretation."

Again, said the court:

> "The statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. *But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair.* One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was fairly necessary to give it place and operation. * * * * Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employes, Congress enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and of course it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute, and the old method is displaced by the new."

It is submitted that the language quoted is a fair analysis of not only the purpose, but the effect of the safety appliance act.

It may be that when the opinion in the *Taylor* case was filed, this court had before it the opinion in the *Delk* case; though the two opinions are too nearly concurrent to make that probable; however, the absolute liability of the railway companies to maintain their cars at all times and under all circumstances, regardless of unforeseeable difficulties and regardless of the incidents of travel and use, was deduced by Mr. Justice Moody through a construction of the act. He said:

> "It is said that the liability under the statute, *as thus construed,* imposes so great a hardship upon the railroads that it ought not to be supposed that Congress

intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other *interpretation* is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional."

These words are not to be overlooked. For the Government (we insist without warrant) relies on the decision in the *Taylor* case as its justification for the assertion of a power and a prerogative as tyrannical as was ever known; and when the Government insists upon convictions for crimes and misdemeanors, regardless of intent and when the accused was diligently seeking to prevent the very thing which occurred, it is time to consider whither we are drifting.

The opinion of the Circuit Court of Appeals of the Sixth Circuit in the *Delk* case, although the facts then before the court did not involve the question of penalizing the railway company, is especially pertinent:

"It is now proposed to add to the obligation of the carrier by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh to impossible. *The coupling apparatus on railroad cars is subject at all times while they are being operated, to almost constant wrench and strain and liability to breakage. Much of the time the cars are connected up in trains running on time schedules, and under orders of train dispatchers which must be observed, or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops.* It is reasonable and just that the carrier should exercise a high degree of care to keep the couplings in proper condition. *But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault.* We do not say that Congress has not the power to impose such an obligation as it is contended this statute imposes; but what we mean to say is that if a statute seems to impose obligations

> so extraordinary and difficult to perform the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction."

We have quoted the above language from the opinion in the *Delk* case in order to support our claim that the absolute liability of the railway company is not expressly declared by the safety appliance act, but has been reasoned out of it by construction; and it is respectfully insisted that the interpretation of Mr. Justice MOODY was made under a mistake of fact that the hardship imposed upon the railroads is only occasional and exceptional. But in the very nature of the case the hardship is frequent and inseparably connected with the operation of trains.

In *United States v. Illinois Cent. R. Co.*, 170 Fed. 542, the same court reversed the judgment below on the ground that the Government in actions to recover penalties under the safety appliance act is not required to prove guilt beyond a reasonable doubt, but that a preponderance of the evidence is sufficient. That court, however, adheres to the views to which it gave previous expression in the *Delk* case; and though the Government may recover, the prescribed penalties if a preponderance of the evidence shows the guilt of the accused, by a suit civil in form, that court declined to assent to the contention of counsel for the Government that its previous holding with respect to the measure of liability imposed upon the railroad company as the same was stated in the *Delk* case, had been overruled by the opinion of this court in the *Taylor* case. We quote from the opinion in the case now cited, the answer to that contention:

> "If this seemed to us with certainty to be so, we should of course be bound to yield our own opinion to the superior authority of that court. * * * Thereupon it will remain for the Supreme Court to determine whether the ruling it has announced is to be extended to facts such as those of the present case. * * * Expressions of opinion as to how the law would be

upon facts essentially different from those in issue are not controlling in another case when such different facts and issues are presented. These rules have been declared on many occasions by the Supreme Court itself, and no appellate tribunal has more strongly emphasized them. * * *

In the case of *St. Louis, etc., Ry. Co. v. Taylor, supra*, the suit was an action to recover damages for a personal injury, and not a penal action such as is provided by section 6. It was founded upon the provisions of those sections of the act which relate to *the subject of equipping the cars, and was not a prosecution for the use of such cars.*"

And though the Circuit Court of Appeals for the Sixth Circuit expressed the opinion, which is in harmony with the decisions of this court, that penalties for offenses against federal law may be recovered in civil suits, that court nevertheless further said:

"While we have held that, in giving an action of debt to recover a penalty, the implication is that the procedure, the pleading, the evidence, and the review of the proceedings are to be such as are incident to an action of debt, *a question of much importance remains, which is whether, the offense being penal, the court is not to have regard to the constituents of the offense itself, and determine its quality by the tests of the criminal law.* In other words, does the mere fact that the remedy is a civil action *relieve the Government from proving that the offense charged was criminal in its nature, and, specifically, was committed in willful neglect of the duty prescribed by law?*

The court in this connection quote the language of Mr. Justice FIELD, in *United States v. Kirby*, 7 Wall. 482, who stated the following principle, which does not permit the construction sought by the Government:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language,

which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

And by way of comment upon and application of the quoted principle, the opinion in the *Illinois Central* case proceeds:

"This statement has been repeated by that court in numerous cases since that time; the latest being perhaps that of *Jacobson v. Massachusetts,* 197 U. S. 11, 25 Sup. Ct. 358, 49 L. ed. 643. It is the opposite of this to recognize a hardship, an injustice, and then to fortify the way to it by adopting the fatalistic answer 'thus saith the law'. And it is, indeed, worse than this if the law does not say it at all. It is to *assume the conclusion and then mold the premises so that they may justify the conclusion. Accidents will happen, and at places more or less remote from places of repair, or where the car cannot be left upon the track without peril to the public as well as to the employes. Undiscoverable defects may at any time appear while the car is moving on the track in a train, and it has been hauled in that condition before it can be known.* We are not prepared to believe that Congress intended to impose a law upon a business of public utility which cannot be carried on without more or less frequent violations of such law, and to fasten thereon a liability to prosecution as for a crime or misdemeanor."

The court then cite the maxim "*Lex non cogit ad impossibilia*" and Broom's commentary thereon:

"The law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases."

On this point the court further said:

"While this maxim is not uniformly applicable, as, for instance, when the statute relates to a dangerous business and gives a private remedy, *we think it is a*

proper one to apply in the construction of a law inflicting a penalty, and the business to which it relates is not itself unlawful.''

We have elsewhere suggested that though the language of this court in the *Taylor* case may apply in a suit against a railway company by one of its employes, for damages resulting from a defective condition maintained in violation of the safety appliance act, a different question is raised in a proceeding instituted by the Government to recover the penalty prescribed by the act, and in the case now cited the following pertinent observation is made:

''The court is not at this time made up of the same members as it was when the *Delk* case was decided, but all are agreed that the decision was right as applied to a defect occurring during transit, and that so applied we should abide by it unless it shall be overruled by the Supreme Court. *Still, if it should be held that our decision in the Delk case was wrong, it does not necessarily follow that in this suit for a penalty the court below was also wrong in giving the instruction complained of.''*

And that instruction embodied the views announced in the *Delk* case.

It is moreover insisted that the safety appliance act does not disclose the intent of Congresss to make railroad companies insurers of the safety of their employes. The companies are definitely and absolutely required to equip their cars and those of other lines which in the course of business they haul, with appliances of the prescribed standard; but the obligation to maintain such equipment in a state of perfection at all hazards and under all circumstances is inconsistent with the eighth section of the act.

The Congress is composed principally of lawyers, and it will be presumed that they have average familiarity with the common law, and that any legislation creating a new relationship between master and servant or affecting the old legal re-

lationship, was brought about after an intelligent consideration of existing law. The eighth section of the act reads:

> "That any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

That section creates a new relationship as between master and servant only to the extent that a servant is not required to assume a defective condition of equipment when known to him, as a hazard of his employment. But this very section 8 recognizes that the right of railroad employes to recover from their employers, damages resulting from injuries occasioned by coupling and uncoupling apparatus not measuring up to the prescribed standard, must in every case be determined upon the proof of want of care, if any, responsible for such default and resulting injury; and as the possible and frequent contributory negligence of injured employes is not referred to anywhere in the act, it is reasonable to presume that the Congress intended that a right of recovery should not be created because a railway company is, under this act, an insurer of the safety of its employes; but intended that the right of recovery for an injury should depend upon the negligence of the railroad company and the freedom from negligence of the injured person.

What we are seeking to make clear is that the absolute liability relied on to sustain the conviction of the Chicago, Burlington & Quincy Railway Company has been ascertained by a construction of the safety appliance act.

The attention of the Circuit Court of Appeals in the instant case was challenged to the fact that no injury had befallen any one, as well as to the absence of intent, and the fact that the offense was established by construction. We quote again from the opinion:

> "It is argued that no criminal offense can be committed when no injury has befallen any one, or when there is no intent to do the act constituting the offense, and that no such offense can be established by construction. Whether these positions are maintainable as abstract propositions of law or not, concerning which we express no opionion, they have no application to the present case. This is not a criminal case. It is a civil action in the nature of the action of debt to recover a penalty, which Congress in its wisdom saw fit to impose upon railroads to secure compliance with certain specified regulations made to promote the safety of passengers and freight carried in interstate commerce and to protect employes engaged in that service."

The court referred to the provisions prescribing the automatic coupling devices and quoted the penal clause of section 6, as follows:

> "That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed."

"This," says the learned judge who wrote the opinion, "is not the language employed in fixing punishments denounced for criminal offenses. The act made it unlawful for railroads to use cars not equipped as therein provided, and thereby imposed a duty upon railroad companies to equip cars accordingly." But the assumed absolute duty, which does not depend upon knowledge or the absence of diligence or the existence of any wrong intent, is rested upon the authority of the *Taylor* case and the opinions of other courts which have construed the opinion in the *Taylor* case, to suit their views.

It is insisted that the court misconceived not only the claim made in behalf of counsel for petitioner, but the law

applicable to the railway company's position as the same is stated by the court.

It may be conceded that a penalty can be recovered in a civil action. *Hepner v. United States*, 213 U. S., 103, and the cases therein cited, settles that. But neither that case nor any of the decisions cited therein deals with *the nature of the statute* under which the penalty is sought to be recovered. It may not make any difference whether a penalty against a corporation is enforced in a civil or a criminal action. *The question which your Honors are to consider does not depend upon the form of an action, but upon the nature of a statute.* And though this be considered as a civil action the statute upon which it is grounded is a penal statute, and the defendant railway company is entitled to have its actual ignorance of the defective conditions, its exercise of reasonable care to prevent same, and its absence of intention to violate that statute, considered as a defense.

But the Court of Appeals manifestly failed to consider the record in this case.

If this is an ordinary law action to recover a penalty, the judgment which the court should have rendered upon this verdict was a judgment of Guilty, and the assessment of a fine thereon, for that was *the verdict returned by direction of the court.* We quote:

> "We, the jury, duly empaneled and sworn to try the issues joined in the above entitled cause, do find the said defendant, Chicago, Burlington & Quincy Railway Company, *Guilty,* as to the First Count, *Guilty* as to the Second Count, *Guilty* as to the Third Count, *in manner and form as charged in the petition herein.*"

And the same form of verdict was rendered on the other petition in the consolidated case. (p. 11.)

Section 1035 U. S. Comp. Stats., 1901, is as follows:

> "In all *criminal cases the defendant may be found guilty* of any offense the commission of which is necessarily

included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, That such attempt be itself a separate offense."

And Section 1041:

"*In all criminal or penal causes* in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, *so far as the fine or penalty is concerned,* may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. * * * "

We therefore challenge the accuracy of the statement that this is a civil cause. There was no indictment, but the court treated the petition to recover the penalty as though it were an information authorized by the criminal procedure in the federal courts.

It is not now open to the United States, as a litigant, to claim any advantage based upon such a technical consideration as that involved in the mere form of the action it selected. To select a form of procedure that forecloses a defense is abhorrent to the sense of justice. The question is broader and deeper than matters of form and goes to the very substance of the Government's claim.

In *Huntington v. Attrell,* 146 U. S. 657, 668, your Honors held:

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *private wrongs and public wrongs.*' The former are an infringement or privation of the private or civil rights belonginging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries;* the latter are a breach and violation of public rights and duties, which affect the whole com-

> munity, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*"

A penalty is none the less a penalty and the statute which imposes it is none the less a penal or criminal statute because the penalty may be recovered in an action which is civil in its form. The difference between the civil and criminal prosecution of corporations is slight.

In *United States v. Illinois Central Ry. Co.,* 156 Fed. 182, the United States District Court for the Western District of Kentucky held this act a criminal law and the violations of its provisions in a broad sense to be crimes or misdemeanors.

In *ex parte Kentucky v. Dennison,* 24 How. 66, an application was made by the State of Kentucky through its then Governor against the then Governor of the State of Ohio for the extradition of a certain individual who had connived at or assisted in the escape of a slave. The question raised was whether the offense for which the accused had been indicted in Kentucky was a crime; for though it was a crime under the laws of Kentucky it was not a crime in Ohio, nor was it an offense against the public safety, nor was it *malum in se.* This court, in its opinion in that case, gave the following definition of crime:

> "The word 'crime' in itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and felony."

In *United States v. Reisinger,* 128 U. S. 308, the question was whether an attorney in a pension case could be punished under the act of June 20, 1878, for having received, prior to its repeal, more fees than were allowed by the act: it was claimed that a statute providing for the repeal of a penalty, forfeiture or liability could not have the effect of releasing or repealing act so expressly provided: and it was contended that extinguishing such penalty, forfeiture or liability unless the words "*penalty,*" liability" and "forfeiture" *do not ap-*

ply to crimes and the punishment therefor, like the charge of receiving an excessive fee in a pension case. But said the court:

> "We cannot assent to this. These words have been used by the great masters of Crown Law and the elementary writers as *synonymous with the word punishment, in connection with crimes* of the highest grade. Thus, Blackstone speaks of criminal law as that branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty."

And in support of the views expressed, the court cite the opinion of Mr. Justice MILLER in *United States v. Ulrici*, 3 Dill. 532, which was an indictment for conspiring to defraud the Government of internal revenue taxes, where it was necessary to determine the meaning of the words "penalty," "forfeiture," "liability," and "prosecution." Mr. Justice MILLER said:

> "Without attempting to go into a technical definition of each of these words, it is my opinion that they were used by Congress to include all forms of punishment for crime." * * *

In *Boyd v. United States*, 116 U. S. 616, 634, this court, speaking through Mr. Justice BRADLEY, said of certain procedure under the customs revenue laws, which provided for penalties by forfeiture and fines:

> "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—*can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens,* and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect, a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey v. The United States*, ante, 436; in which we decided that an acquittal on a criminal in-

formation was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. *As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature,* we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

In *State of Iowa v. Chicago, Burlington & Quincy R. R. Co.*, 37 Fed. 497, the question was whether an action to recover penalties alleged to have been incurred under the provisions of an act of the legislature of Iowa entitled "An Act to regulate the railroad corporations, etc.," was removable as a civil case, and Mr. Justice BREWER held that *though that suit was civil in form it was not "of a civil nature"* which would permit it to be removed to a federal court. The learned justice said that he had "given this subject long and patient examination" in view of the vast interests affected and the importance of the question, and against his first impressions he had been forced to the conclusion he announced. His opinion is a comprehensive statement of the principle and the authorities upon which it rests. He cites *Boyd v. United States, supra,* and refers to the fact that in a separate opinion the late Mr. Justice MILLER said:

"I am of the opinion that this is a criminal case within the meaning of the * * * Fifth Amendment of the Constitution of the United States."

He likewise refers to the decision of this court in *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, which your Honors held to be a technical fine by way of punishment for an offense committed by the insurance company against the statute upon which that suit was based; and summed up the whole of his research in the following language:

"It must be adjudged that in the opinion of the Supreme

> Court of the United States, the ultimate authority on questions of this kind, *an action to enforce a penalty, whatever may be its form, is one of a criminal nature.*"

We also call attention to what this court said in *Grafton v. United States,* 206 U. S. 333, 353, wherein your Honors quote the following language from Mr. Justice GRIER in *Moore v. State of Illinois,* 14 How. 13, saying:

> "It was there suggested that a person could not be punished by two governments on account of or for the same act constituting crime, without violating the 5th Amendment. But this court, speaking by Mr. Justice GRIER, said: 'An offense, in its legal signification, means, the transgression of a law.' "

In *Shick v. United States,* 195 U. S. 65, this court, speaking through Mr. Justice BREWER, held that *the violation of a revenue statute subjecting the offender to a penalty of fifty dollars, is an offense,* saying:

> "The truth is, the nature of the offense and amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses—whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense."

And the learned judge quoted the following definition of "crimes" from Blackstone's Commentaries:

> "*A crime or misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors.*"

Three sections of the safety appliance act make certain things specified therein unlawful in terms; and any claim than a law which provides a penalty for the violation of what is declared to be unlawful, is not a penal or criminal law, does not give value and meaning to common, ordinary English words.

We ask, then, that your Honors consider and decide the

points urged before the Circuit Court of Appeals and which it refused to pass upon, on the theory that they could not be raised in a civil action to recover a penalty.

The summary disposition by the Court of Appeals of these questions was in the following language:

> "It is argued that no criminal offense can be committed when no injury has befallen any one, or when there is no intent to do the act constituting the offense, and that no such offense can be established by construction. Whether these positions are maintainable as abstract propositions of law or not, concerning which we express no opinion, they have no application to the present case."

The Construction of the Safety Appliance Act, Pursuant to Which Penalties Have Been Adjudged Against the Railway Company, Violates the Social Compact.

This was the last of the three propositions which the Circuit Court of Appeals declined to consider. It involves not only the application of the principle that no crime can be established by construction, but an analysis of the effect of the construction given the act, as well as the consideration of what Congress actually intended.

In *United States v. Wiltberger*, 5 Wheaton, 77, 95, Chief Justice MARSHALL said:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * * To determine that a case is within the intention of a statute, its language must authorize us to say so."

In *United States v. Lacher*, 134 U. S. 624, wherein an employe in the New York post-office was found guilty on an in-

dictment under section 5467 of the Revised Statutes, of embezzling a letter containing articles of value, the late Mr. Chief Justice FULLER, citing *United States v. Wiltberger,* said:

"*There can be no constructive offenses.*"

Mr. Justice BREWER stated the rule in *Todd v. United States,* 158 U. S. 278, 282, in the following terms:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.'"

When the exposition of the compact between the states, as the same is contained in the American Constitution, which had been made by Madison, Jefferson and Hamilton, was still fresh in the minds of the people, this court (in *Calder v. Bull,* 3 Dallas, 386) said:

> "The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. * * * There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances

> will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law. * * * The genius the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime. * * * To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

This judicial recognition of the liberty of the individual is in direct accord with the following declaration by Hamilton:

> "The creation of crimes after the commission of the fact; or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, *and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.*"
>
> —*The Federalist*, No. 84.

Those intrusted with the administration of the several departments of the federal government are to be credited with good intentions, and their claims are, in general, entitled to consideration; but the records of this court contain many instances of sharp and emphatic disagreement with, and disapproval of, positions taken by the Government and asserted in its behalf. In *McVeigh v. United States*, 11 Wall. 259, 267, it was claimed that an alien enemy had no right to a hearing. But Mr. Justice SWAYNE, speaking for this court, said:

> "If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the sub-

> ject. It would be contrary to the first principles of the social compact and of the right administration of justice."

It is earnestly insisted that it is no greater blot upon our jurisprudence and civilization to deny an alien enemy a hearing than it is to make a railway company pay a fine because it did not succeed in preventing a condition of which it had no knowledge, until after the occurrence, and which it employed its men and money and used reasonable care to prevent.

In Mr. Justice FIELD's dissenting opinion in the *Legal Tender Cases*, 12 Wall. 457, 670, he said:

> "For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny."

And in this connection the learned justice repeated at length the language herein from *Calder v. Bull, supra.*

Mr. Justice MILLER in *Loan Association v. Topeka*, 20 Wall. 655, 662, used the following vigorous sentences:

> "It must be conceded that there are such (private) rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism."

And it is submitted that no tyranny could be more intolerable and hateful and no power more despotic than the punishment of an American citizen or corporation for something which the accused did not know had occurred, and was using diligence to avoid.

What was it, then, that Congress intended? Shall the statute, to use the language of Justice Moody, "be given an absurd or utterly unreasonable interpretation?" The construction given to this statute which permits the imposition of a penalty against the railroad company of $100 for each unintended violation of, and unpreventable departure from, the standard prescribed for the coupling and uncoupling apparatus on freight cars, *is* an "unreasonable interpretation," and does lead to hardship and injustice.

The history of the original act adopting safety appliances on railroads engaged in interstate commerce is as follows:

The House Committee on Interstate and Foreign Commerce of the Fifty-second Congress, to which had been referred sundry bills on the subject, on July 8th, 1892 (Cong. Rec., Vol. 23, pt. 6, p. 5925), reported a committee bill, H. R. 9350, with recommendation that it pass, and that all other bills on the subject be laid on the table. The committee bill was passed under suspension of the rules without debate. (Cong. Rec., Vol. 23, p. 5927.)

The bill reported by the committee and passed did not contain any regulation affecting the manner of dealing with or disposing of cars where any prescribed appliances failed, through accident or casualty, after the car had started on its journey. ((See bill, Cong. Rec., Vol. 23, p. 5925.)

The committee report, however, in summarizing the features deemed to be essential, under the item of *uniform height of draw bar*, states:

> "The railroads have themselves largely established a uniform height of draw bar from the rails with a maximum variation. It sometimes happens, however, that when cars are started out from the road to which they belong they do not get back for many months, and during that time the draw bars are getting down until they get away from the standard, in which condition it is impossible to couple them with those of a standard height without using crooked links, the difficulty

> of which adds largely to the danger and death rate. It is, therefore, considered highly important that a standard height of draw bar from the rails with a maximum variation should be maintained, *and that cars should not be used when out of repair.*"
>
> Cong. Rec., Vol. 23, p. 5926.

The concluding clause in the quoted paragraph of the House Committee's report is the only reference found in the entire history of this legislation, in the proceedings and debates in both Houses, referring to cars "out of repair." That clause was not, however, carried into the bill presented by the House Committee, nor into the substitute bill presented by the Senate Committee, which finally passed both Houses. The reference quoted seems also to relate particularly and specially to variations in the height of draw bar from the standard adopted—the precise application made by Mr. Justice MOODY in *St. Louis & I. M. R. R. Co. v. Taylor, supra.*

Passing from the initial proceedings had in the House, the history of the Senate proceedings is as follows:

July 9th, 1892, this bill, H. R. 9350, was referred to the Senate Committee on Interstate Commerce. (Cong. Rec., Vol. 23, p. 5932.) July 21st, 1892, the Senate Committee reported the bill with a substitute. (Cong. Rec., Vol. 23, p. 6483.) The report of the Senate Committee, presented July 22nd, 1892, (Cong. Rec., Vol. 23, p. 6552) is not printed in the record. The substitute reported by the Senate Committee appears in Vol. 24, pp. 1246, 1247.

February 6th, 1893, Senator CULLOM, chairman of the Senate Committee on Interstate Commerce, who had charge of the bill in that body, speaking of the purposes of the committee in presenting the substitute, said (Cong. Rec., Vol. 24, p. 1247):

> "Certainly the Senate Committee has been disposed to be as kindly towards the railroads as it could afford to be and at the same time do anything in the direction

of requiring these common carriers *to put upon their cars and locomotives improved devices.*"

Again at page 1248, Senator CULLOM, in stating the purpose of the bill, said:

"It is true that there is no uniform device used by all the railroads. What is aimed at now, in the proposed legislation, is that there shall be a uniform device, and that that uniformity shall be secured at once by an Act of Congress; that by an Act of Congress the railroad companies shall cause every engine to be equipped with air brakes, and that the ordinary cars for purposes of transportation shall be so equipped that they can be used with air brakes and not by hand brakes; and so with couplers."

At page 1249 Senator CULLOM said:

"The desire of the Committee, so far as I know, has been that something should be done upon this question that would give the common carriers or railroads of the country to understand that they must put these devices, or some devices, upon their cars and locomotives to give greater security to the lives of the men who are operating the railroads."

At page 1273 Senator CULLOM said:

"Then, as to the second section of the bill, that section has reference only to what are usually called automatic couplers. It was the intention and purpose of the Committee, and I think it is carried out in the substitute, *to simply require a uniform coupler*, the testimony showing that such *a coupler must be put in use* by direction of the national government, in order to protect the lives of the people operating the trains, taking care of the cars, coupling them, etc."

After referring to statistics of railway casualties, the Senator, at page 1275, said:

"All these tables show that the attempt on the part of the common carriers to put on different devices, slow as they have been in putting them on, has resulted in greater injury and a greater number of killed, as a consequence of the confusion existing in reference to the coupling of cars, the fact being that the greater

> the number of improvements, until we reach a particular point of uniformity, the greater the confusion will be. But when the cars shall all be equipped with an approved coupler of a certain type, then the men engaged in coupling the cars will know with what they have to deal."

Senator WHITE (now Mr. Justice WHITE) spoke briefly on many occasions during the senate debates on the bill, in its favor, but none of his utterances indicate that he conceived it to be within the scope of the bill to adopt any regulation for handling or disposing of cars *whose appliances failed through accidental means between stations.* Such a regulation is not embodied in the bill, is outside of its scope and subject matter, and is not touched upon in the senate debates on the bill.

It is interesting and instructive to note that the suggestions of Senator WHITE were directed closely to the matter of fixing *a standard of uniform equipment, and in no instance referred to the subject matter of unavoidable casualties* which must, by natural laws, inevitably cause the frequent failure of any standard of appliance that can be devised or adopted.

At page 1277 (Vol. 24), Senator WHITE answered an argument that the common law held the carriers responsible for failure to adopt the most improved appliances, by referring to the rule that such carriers have the right to employ such appliances as are in common and general use, and showed that any change from that standard must be effected by legislation.

At page 1280, Senator WHITE sustaining the necessity of a statutory standard of equipment, said:

> "The report of the Committee shows that for the year 1890 there was an increase of 94,787 cars in the United States, exclusive of those in passenger service, and only 16,287 of them were equipped with train brakes and only about one-third of those put in use during the year were fitted with automatic couplers."

Again, at page 1284, Senator WHITE, interrupting the speech of Senator WOLCOTT, put the case as follows:

"I find this difficulty in my mind. Taking all the state-

ments which the distinguished senator has made as accurate, how does that meet the difficulty that the railroads using their best endeavor at the present time, this best endeavor being used on different roads, reach different conclusions upon different roads? Road 'A,' using its best endeavor, reaches one conclusion and puts in one form of appliance; road 'B,' using its best endeavor, put in another form of appliance. If those two appliances brought together, *because of their want of uniformity*, beget fatality to human life, does the argument of best endeavor remove that difficulty?"

At page 1287, Senator CULLOM, expressing the appropriate limits of the legislation proposed, said:

"The purpose of the Committee in this bill is simply *to provide for a uniform coupler and for an air brake* about which there shall be no particular controversy. When we get the cars of this country equipped with uniform couplers and with air brakes, so that men will not be required to go between the cars, so that men who are on top of the cars today will be taken off and thereby relieved from the danger of such positions, there will be no occasion for any further legislation on the subject, in my judgment."

Senator HOAR (Cong. Rec., Vol. 24, pp. 1287-1288), called attention to the fact that the proposed legislation was merely the application to the means of transportation on land of the settled policy of Congress relating to transportation by sea. Surely it has never been supposed that the prescribed penalties for failure to provide steamships with life saving appliances may be visited upon the owner whose steamer was properly equipped at the beginning of the voyage, but whose appliances were lost or rendered inefficient through perils of the sea during the voyage. Congress has not yet declared that all perils, either of the sea or the road, may be entirely overcome by any appliance, nor that such perils may not, or must not in individual cases, result in failure and destruction of the very safety appliance prescribed.

The substitute bill of the Senate Committee passed the Senate February 11, 1893 (Cong. Rec., Vol. 24, 1486). Febru-

ary 27th, 1893, the House concurred in the Senate amendments (Cong. Rec., Vol. 24, p. 2247, 2248); and the bill received executive approval on March 2nd, 1893 (Cong. Rec., Vol. 24, p. 2457).

A critical examination of the legislative proceedings indicates that in respect to couplers, it was the sole object of Congress to provide for the equipment of cars, a uniform, interchangeable, automatic device. The act passed, by its terms imports no other purpose. The words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars," are merely descriptive of the character of device prescribed. With a system of uniform devices once established, it was thought no further legislation would be necessary, and so the subject matter of accidents en route between stations, which are inevitable and due to unavoidable hazards of the road, by which an appliance fails, was not embraced in the act and has not been covered by any amendment subsequently passed.

If the safety appliance act prescribes a rule or regulation for cars that were equipped as the law required at the commencement of their journey and which were inspected for defects in their equipment at the repair station last preceding the one where defects were found, and which were crippled by unavoidable accident en route, such regulation rests upon *judicial construction and judicial legislation,* for it cannot be deduced from the arguments of the distinguished gentlemen who took part in the discussion in the House and Senate upon this act, prior, to its passage.

In the case at bar, the disablement of the cars occurred between stations, where both physical necessities and the discharge of public duties made it imperative that the cars should proceed with the trains to the next switch or station. Take the case of the two coal cars: there was no place at Gibson, where they were inspected by government inspectors, nor within two miles of that place, to make the repairs which were needed

and which were that very day made. When the Northern Pacific car reached Alliance, Nebraska, it was taken out of the train which was taking it home, and kept there at least twenty-four hours, for it was there the last time the government inspectors saw it.

These cars, properly equipped, lawfully departed from the stations where they were inspected for the discovery of existing defects in their coupling and uncoupling apparatus. If some of these defects had been discovered while the trains were in motion, it was more of a public duty to remove the cars, with their defective appliances, from off the public highway, than to impede the public business by holding the trains on the main track until a car repairer might be gotten from some other repair point, the distance of which from the place where the defect might be discovered would depend upon the section of the country where the defect appeared.

No employe of the company is making complaint of any risk or exposure to risk or hazard created because of these defects which have been charged against the Burlington Railway Company at $100 each; and to hold that a car may not be carried from the point where a defect is discovered to the next repair station, for the purpose of putting it in the condition prescribed by the act of Congress, is a clear usurpation of the legislative department of the government, if, indeed, it is proper for that department to prescribe such an unreasonable regulation. Such a holding applies the prescribed penalties to a situation not contemplated by Congress nor included within the terms of the act.

Automatic and instantaneous repair devices have not yet been invented; and to require the railroads of America to install some system of railroad operation which shall, in effect, place upon every train hauled some scheme by which repairs shall be automatically made, or through which they may be instantaneously made, is impracticable and a manifest absurdity.

The construction of the act contended for by the Government will not only revolutionize railroading and the relations of the companies to their employes, but will inaugurate a new era—and not a hopeful one—in the practice of this republican experiment of ours; *for if the District Court and the Circuit Court of Appeals gave the act the proper construction, crime may exist without either knowledge of the unlawful act done or omitted, or an intent to do or permit the unlawful thing, or an injury to person or property.*

This record does not establish the right of the Government to a fine of $100 for each one of the cars, if that right is to be tested by either the letter or the spirit of the act, or the elementary principles on which the right must rest; and we protest against the application to these facts of this unrepublican and tyrannical conception of governmental power.

There Can Be No Crime or Offense Where There is No Injury.

It is undisputed that in none of the cases complained of was any injury suffered by any person.

By common consent, James Wilson was not only one of the greatest men who have figured in American life, but he was one of the most profound lawyers and jurists in our history. He defined a crime as follows:

> "A crime is an injury, so atrocious in its nature or so dangerous in its example, that, besides the loss which it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences the interest, the peace, the dignity, or the security of the public. Offenses and misdemeanors denote inferior crimes."
>
> 2 *Wilson's Works* (Andrews' ed.), 338.

Wilson asserts, in that same connection, without equivocation or modification, that the doctrine which teaches that without injury to an individual, a crime may be committed against the Government, is unsupported by sound legal principle. He says:

"Every crime includes an injury; every offense is also a private wrong; it affects the public, but it affects the individual likewise."

Id. 339.

And again he says:

"The doctrine, that a crime may be committed against the public, without any injury done to an individual, is as little consonant to the history as it is to the principles of criminal jurisprudence."

Id. 340.

After a review of the history of criminal jurisprudence, this learned writer says:

"These observations, drawn from so many separate sources, combine in the result, that a crime against the public has its foundation in an injury against an individual. We shall see, in the progress of our investigation, that as, in the rude ages of society, the crime was too much overlooked; so, in times more refined, there has been a disposition, too strong, to overlook the injury."

Id. 341.

This statement of the elementary principle fits the instant case. We are living in those "times more refined," and are confronted with "a disposition, too strong, to overlook the injury."

Again, and at another time, Wilson asserts, as an axiom:

"Every crime includes an injury; every injury includes a violation of a right."

Id. 376.

No Criminal Offense Can Be Committed Where the Intention to Do or Permit the Wrongful Act is Wanting.

Says Dr. Bishop:

"* * * Nothing short of the intent to do a forbidden thing, or some such substitute for this particular intent as has been considered in these chapters, will make a man criminal. Where such intent is wanting,

> he commits no offense in law, though he does acts completely within all the words of a statute which prohibits the acts, being silent concerning the intent."

1 *Bishop on Criminal Law*, 5th ed., § 345.

In *United States v. Houghton*, 14 Fed., 544, 549, United States District Judge NIXON thus instructed the jury:

> "It is a fundamental doctrine of the law that no man is to be punished as a criminal unless his intent is wrong, and such wrong intent must, ordinarily, be followed by a wicked act—the mere intention not injuring any one, unless developed into some act to give it force and effect."

In *People v. White*, 34 Cal., 183, it was held:

> "To constitute crime, there must be a joint operation of act and criminal intent or criminal negligence."

The same principle was applied in *State v. Swett*, 87 Me., 99, 32 Atl., 806, where a common carrier who carried short lobsters without knowing, or having reasonable cause for believing, that they were short lobsters, was held not liable to the penalty ordinarily attaching to the having possession of short lobsters.

In *Furley v. Chicago, M. & St. P. Ry. Co.*, 90 Ia., 146, 57 N. W., 719, it was held that a railway company was not liable for bringing diseased cattle into the state by the car load contrary to law, if the company could prove "*that it was free from negligence* in receiving and transporting the car over its road."

The supreme court of Indiana held, in *Schmidt v. State*, 78 Ind., 41, that one charged with the sale of diseased meat must have knowledge of the bad quality of the meat, and intend to sell it for food.

In *Hunter v. State*, 101 Ind., 241, one charged with selling liquors to a minor was permitted to show that he believed that the minor was, in fact, an adult.

In *McLain on Criminal Law*, § 128, this principle is thus stated:

"* * * This doctrine, that one who violates a penal statute is absolutely liable regardless of knowledge of the facts which render his acts a violation thereof, applies only to the regulation of kinds of business which may, or may not, be prosecuted at the option of the party, and which he does prosecute at his peril. *But it does not apply to a business which is in its nature lawful, such as that of carrier, which there is a public duty to perform.* And therefore it is held that there could be no punishment of a carrier for bringing into the state cattle infected with Texas fever where there was no negligence shown. Indeed, on the whole question as to whether absence of intent may be shown as a defense in a prosecution for violating statutory regulations, the authorities are irreconcilably in conflict; and in contradiction to cases previously cited in this section, it has been held that mistake or want of knowledge as to the facts which bring the case within the statutory prohibition may be shown as a defense. Thus, mistake or want of knowledge as to the age or character of the person to whom liquors are sold in violation of statute may, according to some authorities, be shown. So in a prosecution for removing and concealing dead bodies, it has been held that one who purchases such bodies to supply a medical institute was not punishable for violation of the statute, unless he knew them to have been illegally procured. Other illustrations of the same principle may be found. The apparent conflict in the cases on this subject is to be explained upon the principle that the question whether not intent is material must be determined by the construction of the particular statute in question, and if the construction excluding the element of intent *would lead to an absurdity, the defense of want of intent must be admitted.* On the other hand, if the prohibition is in respect to some duty of a public nature, plain and simple of performance, want of intent or knowledge may, by the terms of the statute, be deemed excluded. But it may be observed in this connection that the cases which hold that an absolute statutory prohibition admits of no exception based on want of criminality in the intent, unless such excep-

> tion is expressly recognized in the statute, go too far. Criminal statutes seldom make any exception on the ground of infancy, insanity, voreture, or mistake, and yet there is no doubt that these common-law exceptions are recognized with reference to statutory offenses as fully as they are in regard to those which are *mala in se*. The rule of construction which would allow the ordinary exceptions to be made to the criminal liability under a statutory provision will be especially applicable where the statute is merely an expression of the common-law; and it has been suggested that *the omission in a statutory definition of any requirement of criminal intent has only the effect of throwing the burden of introducing evidence of the absence of such intent upon the defendant.*"

We have already referred to the rule laid down by the District Court for the Western District of Kentucky in *United States v. Illinois Central Railroad Company,* 156 Fed., 182, which is apparently the same case reported on appeal, under the same title, in 170 Fed., 542. Judge EVANS, United States District Judge of the Western District of Kentucky, held:

> "No intelligent person can shut his eyes to the fact that the rapid motion, rough jostling and jolting of the trains, and their immense weight may at some time result in injury to such equipment. There cannot be much nicety in the movement of freight trains. * * * If * * * those appliances were all in good order and condition when the car originally started on its interstate journey, and afterwards became defective during the transit, then, in order to convict, the evidence must show to the exclusion of a reasonable doubt that the alleged defects had respectively been either in fact discovered by the carrier or else that they could have been discovered and corrected by it by the exercise of the utmost degree of care and diligence which could be expected at the hands of a highly prudent man under similar circumstances."

The Circuit Court of Appeals reversed the judgment of conviction upon the ground that it was only necessary to prove by a preponderance of the testimony, and not to the exclusion of a reasonable doubt, the existence of the facts which served

to convict; but the court adhered to the views previously expressed in the *Delk* case and which were incorporated into the charge of Judge EVANS in the *Illinois Central* case.

The learned Circuit Judge who wrote the opinion in the *Delk* case thus stated a well-known incident in railroad operation:

> "The coupling apparatus on railroad cars is subject at all times while they are being operated to almost constant wrench and strain and liability to breakage. * * * Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops."

Whatever the form of the action to recover the penalty for a violation of the safety appliance act, sections 1, 2 and 4 declare certain things unlawful that prior to the passage of the act were not unlawful. The action therefore is of the quasi-criminal *nature*, mentioned in *Boyd v. United States, supra*, where the court said:

> "*Suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature.*"

And in the case already cited of the *State of Iowa v. Chicago, Burlington & Quincy Railway Co.*, though the action was *similar in form*, Mr. Justice BREWER held that it could not be removed from the state court, where it was brought, into the federal court under the removal act, *because it was not of a civil nature;* and it was therefore his deliberate conclusion, and your Honors have repeatedly held, that "*an action to enforce a penalty, whatever may be its form, is one of a criminal nature.*"

That being so, the intent to commit the offense charged, or at least an intent to do or permit the thing condemned, or a negligent omission to prevent the unlawful occurrence, must be established before the penalty for the violation of a federal law can be recovered by the Government.

This is not a case in which the intent can be inferred from the quality of the act. A departure from the standard prescribed by the safety appliance act is not *malum in se* and no turpitude of the petitioner is suggested; in fact, the Circuit Court of Appeals state:

> "It appears by the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law." 170 Fed., 557.

In *Pettibone v. United States*, 148 U. S., 197, there was a prosecution by indictment charging a conspiracy under section 5440 of the United States Statutes, to obstruct the administration of justice in the Circuit Court of the United States for the District of Idaho; and conviction was sought to be sustained in the absence of proof of evil intention. This court, answering the argument in support of such claim, said:

> "It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, thefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability. 1 *Bish. Crim. Law*, Section 335. It is true that if the act in question is a natural and probable consequence of an *intended* wrongful act, *then the unintended wrong may derive its character from the wrong that was intended;* but if the unintended wrong was not a natural and probable consequence of the intended wrongful act, then this artificial character cannot be ascribed to it as a basis of guilty intent. The element is wanting through which such quality might be imparted."

This principle and its application are both illustrated in *Reynolds v. United States*, 98 U. S., 145, which was an indictment for bigamy under an act which, as we understand it, was directly aimed at the suppression of polygamy in Utah. This court, speaking through WAITE, Chief Justice, said:

> "A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted."

Again your Honors' attention is directed to the undisputed proof in the case at bar, that the accused was seeking to avoid the very occurrence which happened.

In this country it was never the law, until the instant case and some others practically concurrent with it were decided, that one could be convicted of a crime based upon an accidental occurrence.

In *Barlow v. United States*, 7 Pet., 404, which was a prosecution for a violation of the revenue law, the defense was that certain sugars were entered under a false denomination by mistake. There was evidence which convinced the court that this defense was not made in good faith, and, speaking through STORY, J., the court said:

> "*There was no accident in the case; there was no mistake in point of fact;* for the party knew what the article was, when he entered it. The only mistake, if there has been any, is a mistake of law. The party in the present case has acted, indeed, with his eyes open."

Therefore, while a conviction was sustained on the facts and in the belief that the defense was not made in good faith, this court announced the rule which appeals to the reason and sense of justice of all men:

> "*For mistakes of fact, the legislature might properly indulge a benignant policy, as they certainly ought, to*

> *accidents.* The very association of mistake and accident, in this connection, furnishes a strong ground to presume that the legislature had the same classes of cases in view; *accidents, which no prudence could foresee or guard against,* and mistakes of fact, consistent with entire innocence of intention."

In *United States v. Hess,* 124 U. S. 483, the defendant was convicted of the fraudulent use of the mails. The indictment was held insufficient. This court, citing *United States v. Cruikshank,* 92 U. S. 542, said:

> "A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

In *Davis v. United States,* 160 U. S. 469, 484, the following elementary propositions were stated:

> (a) "To make a complete crime cognizable by human laws, there must be both a will and an act; and
> (b) As a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."

And it therefore resulted, necessarily, in the opinion of your Honors:

> "To constitute a crime against human laws, there must be, first, a vicious will; and, secondly, *an unlawful act consequent upon such vicious will.*"

In *Felton v. United States,* 96 U. S. 699, an action was brought by the United States to recover a penalty of one thousand dollars prescribed by the Act of Congress regulating the distillation of spirits. The still of defendants having become worn and defective, a new one was made for use in their distillery, which proved to be too large for the capacity of the low-wine receiver, and shortly the low-wines began to overflow and run to waste. The defendants and their servants were ignorant of this want of capacity of the receiver until it was too late to remedy it for the distillation which was then taking place, and there was no course left for them but to let the wines overflow and run to waste or to catch them, and

secure their benefit to the Government and themselves by dumping them into vats for redistillation. The superintendent of the distillery called upon the assessor and asked permission to draw off from the receiver a portion of the low-wines and dump them into vats for redistillation, but did not get such permission and later the Commissioner of Internal Revenue refused to grant it, but directed the defendants to build new cisterns. After the request on the Commissioner was made, and before his answer was received, the superintendent of the distillery, finding that the wines had overflowed, permitted about 400 gallons of low-wines to be drawn off and dumped in a vat from whence material was at the time being pumped for redistillation. This was done in good faith for the purpose of saving the property to the defendants and the Government.

The defendants asked the court to instruct the jury, in substance, that if the inadequacy of the low-wine cistern was unknown to either the defendants or the superintendent until too late to prevent the overflow, and that then the superintendent in the exercise of his best judgment and in good faith drew off the wine and dumped the same into vats for redistillation, the defendants were not liable: but the court refused to thus instruct the jury and charged that the defendants must be held accountable for the actions of their superintendent in the management of the distillery, and if they found that he had violated the law by intentionally opening the low-wine reservoir and withdrawing the plug from the pipe so that the spirits could be and were abstracted while passing from the outlet back to the still, they were authorized to find against the defendants. The jury found for the plaintiff, but accompanied their verdict with a finding that there was only a technical violation and that there was clearly no intention to defraud the Government thereby.

Mr. Justice FIELD, after thus stating the case, and in the course of the opinion of the court, said that the Act of Con-

gress was designed to guard against frauds upon the revenue which might be perpetrated through any other construction of the machinery in distilleries, than that prescribed. But, said he:

> "It did not intend to prohibit such abstraction when necessary, from unforeseen contingencies, to prevent the waste or destruction of the liquor. Accidents in the distillery—such as the breaking of the bands of the cisterns, and leakage from unknown defects, the danger of an approaching fire, and many other causes—may not only render it necessary, but a duty, on the part of the distiller, to draw off the liquor in the speediest way. *The spirit and purpose of the act are not to be lost sight of in a strict adherence to its letter.*"

The offense was declared to consist in the failure to have a receiver of sufficient capacity to hold the low-wines which were distilled on a given date; but the proof showed that the defendants were ignorant of the defect in the receiver until it was too late to remedy it for the distillation which was then taking place. "*There was, therefore,*" said the learned justice, "*an absence of that knowledge which could render the neglect wilful, and therefore actionable.*"

He further said:

> "Parties are presumed to be acquainted with the utensils and machinery used in their business, and of course with their character and capacities. *But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted.* ALL PUNITIVE LEGISLATION CONTEMPLATES SOME RELATION BETWEEN GUILT AND PUNISHMENT. TO INFLICT THE LATTER WHERE THE FORMER DOES NOT EXIST WOULD SHOCK THE SENSE OF JUSTICE OF EVERYONE."

The case now cited and the one at bar are strongly similar. There was no intention to evade the provisions of the safety appliance act. There was no intention to do the act or permit the condition which would constitute, if even negligently per-

mitted, a violation of the act; the usual means to comply with its requirements were adopted; and petitioner did not know that such means had failed. Therefore the imposition of the penalty prescribed by the act, in the absence of intention to evade the law and the positive and undisputed exercise of reasonable care through the usual means to preserve the integrity of the equipment, shocks the sense of justice. But the opinion of this court in the cited case recognizes the difficulty of perfection and the necessity that those engaged in industrial enterprises must rely upon other people.

Speaking directly of the obligation which the law imposed upon those engaged in the business of distilling spirits, the court said:

> "All that the law does require or can require of them, to avoid its penalties, *is to use in good faith the ordinary means—by the employment of skilled artisans and competent inspectors*—to secure utensils and machinery which will accomplish the end desired."

The principle that even in cases involving no moral turpitude, *there must be an intention to do the act* which constitutes a violation of law, was well stated by the Circuit Court of Appeals of the Eighth Circuit in *Armour Packing Company v. United States*, 153 Fed. 1; at page 23 the court said:

> "The defendant knew it was receiving, and it intended to secure, a concession from the filed and published rate, knew that it was committing an act which the Elkins act declared to be illegal, and this is the only criminal intent requisite to convict of a statutory offense that is not wrong in itself. A corrupt purpose, a wicked intent to do evil, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is a mere *malum prohibitum. A simple purpose to do the act forbidden,* in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense, which is not *malum in se.*"

And this court on certiorari to the Circuit Court of Appeals in the same case said:

> "While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, *where purposely doing a thing prohibited by statute* may amount to an offense, although the act does not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive transportation of goods at less than the published rate. * * * The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required. 1 Bish. Cr. Law 5th ed.), sec. 343. A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles."

Armour v. United States, 209 U. S. 56, 85.

But no question is raised here of a mistake of law; there was not only no purpose to do or permit the prohibited thing, but an intent not to do it, and an honest effort by the exercise of reasonable diligence, to obey the law, and prevent the very conditions which occurred, and which were in fact incidental to and accidents of, the movement of the cars.

It is therefore submitted that the judgments of the United States District Court for the District of Nebraska, and the United States Circuit Court of Appeals for the Eighth Circuit, are erroneous and must be reversed.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Attorneys for Petitioner.

Omaha, September 15, 1910.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, petitioner,
v.
THE UNITED STATES.
No. 329.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This is a suit to recover penalties for violations of the safety appliance act of March 2, 1893. Four separate violations were charged, each involving a different car. The cars in question were Kansas City, Fort Scott & Memphis car No. 13567, Chicago, Burlington & Quincy car No. 80263, Chicago, Burlington & Quincy car No. 86192, and Northern Pacific car No. 5764.

(1) With reference to Kansas City, Fort Scott & Memphis car No. 13567, it was stipulated that this

car was "on August 8, 1905, then being hauled on defendant's railroad and then contained merchandise consisting of coal, consigned from a point outside the State of Nebraska to a point in the State of Nebraska." It was then proven that about 8.20 a. m. on August 8, 1905, it was inspected by the Government safety appliance inspectors at the Gibson yard on defendant's railway, which yard is situated about 2 miles south of Omaha, Nebr. (Rec., 25); that on the "A" end of the car the chain connecting the lock pin or lock block (i. e., the pin or block which holds the knuckles in place while the car is coupled) with the uncoupling lever, was found to be broken, which made it impossible to uncouple the car without the necessity of a man going between the ends of the cars (Rec., 27, 28); and that while the coupler was in this defective condition the car was hauled from said Gibson yard to the Douglas Street yard at Omaha, Nebr., as one of a string of about 30 cars, and was there uncoupled by an employee who went between it and the adjoining car. (Rec., 29, 37.) There were two car repairers stationed at the Gibson yard, whose duty it was to inspect and make light repairs to cars coming into that yard. (Rec., 29.)

(2) It was stipulated as to Chicago, Burlington & Quincy car No. 80263 that, on or about August 9, 1905, it "had been hauled on the defendant's line of railroad from Tyrone, Iowa, and was loaded with coal consigned from Tyrone, Iowa, to Omaha." (Rec., 24.) The United States then proved that it was inspected by government inspectors at the Gib-

son yard on August 9, 1905 (Rec., 30), and it was found that the bottom clevis (i. e., the device connecting the lifting chain to the lock block) of the coupler on the "B" end of the car was missing (Rec., 31), which rendered the uncoupling lever useless, and thus made it necessary for a man to go between the cars when the car in question was required to be uncoupled; and that while the coupler was in such defective condition the car was moved from the Gibson yard to the Douglas Street yard in company with other cars. (Rec., 31.)

(3) The same stipulation was made with reference to Chicago, Burlington & Quincy car No. 86192 as with reference to No. 80263 (Rec., 24), and it was proven that this car was inspected at the same place and time; that the grab-iron on the B end of it, opposite the uncoupling lever, was found to be missing (Rec., 32); and that while in this condition it was moved from the Gibson yard to the Douglas Street yard in company with other cars. (Rec., 31, 32.)

(4) With reference to Northern Pacific car No. 5764, it was stipulated that on January 26, 1906, it was moving from Seneca, Nebr., in a northwesterly direction, in a train which contained three other cars carrying interstate merchandise, but that this car was empty during the entire trip and was going home to the Northern Pacific Railroad Co. (Rec., 24.) It was then shown that this car was inspected by the Government inspectors on that day while in the train at Seneca, Nebr., and was again inspected the next day at Alliance, Nebr., which is about 100 miles from

Seneca. In each case it was found that the top clevis (connecting the lifting chain with the lifting lever) on the coupler on one end of the car was missing. (Rec., 52, 53.)

By way of defense in respect to cars 13567, 80263, and 86192, the railway company proved that it maintained a force of car inspectors and equipment for repairing cars, at Creston, Iowa (Rec., 59); that it is the custom for its inspectors to there inspect all cars passing through, although *no record of the inspection is made except when cars are found to need repairs,* the foreman of inspectors saying:

> We keep no record of defective cars except what needs repairs, we mark them "bad order" and set them over to what we call the "rip" track. (Rec., 59.)

The "rip track" is the repair track. (Rec., 59.) While the evidence on the point is not entirely clear, it seems to indicate that such minor repairs as the replacement of a clevis or clevis pin are made *without sending the cars to the repair track and without making any record of the repairs.* (Rec., 60.) Accordingly, there is no affirmative evidence in the record showing that any of the three cars now referred to were inspected at Creston, Iowa, at all. Indeed, there appears no positive testimony showing that the cars *ever passed through Creston.*

With reference to car No. 5764, plaintiff in error proved that the car had been extensively repaired on January 17, 1906 (Rec., 66), and that among other repairs made at that time the pin lifters (i. e., the

uncoupling levers) were replaced, and other repairs were made which would have necessitated disconnection between the uncoupling lever and the lifting chain; but there is no evidence that the connection was afterwards made, beyond the testimony of the foreman that it was his habit to look the cars over after they were repaired to see that everything was in proper shape.

The company also introduced evidence to the effect that its records at Ravenna, Nebr., an inspection and repair point, made on or about January 26, 1906, had been examined, and that no entry had been found in them concerning this car (Rec., 71); but there, as at Creston, Iowa, no record is kept except of cars found to be defective. (Rec., 71.) Ravenna is 130 miles from Seneca, the point at which the Government inspectors first discovered the defect (Rec., 74), and Seneca is intermediate between Ravenna and Alliance. (Rec., 72.) There is no evidence whatever that the car in question had passed through Ravenna; and for all that appears in the record, the car may have come to Seneca from the opposite direction. How long it had been at Seneca, and whether or not it was put into the train where the Government inspectors found it, or at some other point, does not appear; and it is noteworthy that only such records as were made "on or about" January 26, 1906, at Ravenna, were examined. The record, therefore, contains practically no evidence which tends to show that this car had been inspected by the company.

When the United States rested, plaintiff in error moved for peremptory instructions on its behalf, which motion was overruled. (Rec., 57, 58.) At the close of the evidence, plaintiff in error renewed its motion, and the United States also moved for peremptory instructions; and the court directed a verdict for the Government on all counts in both cases. (Rec., 76, 77, 78.) The case was removed by writ of error to the circuit court of appeals, eighth circuit, and the judgment of the trial court was there affirmed, and the case was brought to this court by writ of certiorari. A number of errors are assigned, but plaintiff in error's real contention is that the trial court erred in holding that "it is not necessary that the carrier shall *knowingly* offend against the statute;" and that, if under the language of the statute knowledge is not necessary, the act for that reason is unconstitutional.

BRIEF AND ARGUMENT.

I.

The act of March 2, 1893 (ch. 196, 27 Stat., 530), as amended by the act of March 2, 1903 (ch. 976, 32 Stat., 943), makes it unlawful for any car to be hauled on a railroad engaged in interstate commerce, with safety appliances not in a usable condition; and section 6 of said former act, which provides for the recovery by the United States of a penalty of $100 for a violation of any of the provisions of the act, likewise extends to the maintenance of the appliances, and in case of violation makes the liability of the company for such penalty absolute, regardless of whether the statute was violated with the knowledge of any employee of the company or not.

1. *The provisions of the statute other than section 6 require that the appliances be maintained in a usable condition, and said section should be applied to them as thus construed.*

The question whether the general provisions of the statute require that the safety appliances be kept in repair is considered on pages 15 to 71 of the brief filed on behalf of the United States in the case of *Delk* v. *St. Louis & S. F. R. Co.* (No. 88), and the argument there made will not be here repeated. It is there shown that the act is highly remedial in character, and should not be so restricted by construction as to prevent to any extent the accomplishment of the object for which it was enacted.

It is insisted, however, that section 6 is penal, and that the act should, therefore, be strictly construed; but if it be conceded that section 6 is penal rather

than remedial, yet it is a well-recognized principle that a statute may be remedial in part and penal in part, and that the remedial provisions will be liberally construed, whereas the penal provisions may be subject to the rule of strict construction.

36 Cyc., p. 1183;
2 Lewis Suth. Stat. Con., 2d ed., sec. 337;
Endlich Inter. Stat., sec. 332.

Hence, the fact that the statute contains a section which may be regarded as penal in its nature, can have no effect upon the construction of the other sections, which are clearly and unmistakably remedial in their character.

As shown in the brief in the Delk case, the other sections of the act impose an absolute duty upon the companies to haul no cars not equipped with appliances in a workable condition, and there is no authority for construing them in one way in order to hold the company liable in a civil action for damages to an employee, and in another way in an action for a penalty at the instance of the Government.

In *United States* v. *Keitel* (211 U. S., 370, 392) the defendant had been indicted for a conspiracy to defraud the Government in the procurement of the title to lands. In a previous case which had been brought under the same statute to set aside patents to lands which had been procured in violation of its provisions, a certain construction had been placed upon material provisions of the act. But it was insisted on behalf of the defendant that the

construction adopted in that case should not be followed, because that was a civil case, whereas the one at bar was a criminal prosecution. However, this court held otherwise, saying:

> Because the statute was thus construed in a civil cause, affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case.

Therefore the meaning of the other sections must be ascertained independently of section 6, and that section be applied to them as thus construed, and it must then be determined whether section 6, though it be considered penal in its nature, can *within itself* be so construed as to require the intent to violate or knowledge of the violation of the other provisions of the law, in order to create liability thereunder.

2. *Said section 6 should not within itself be strictly construed.*

In considering this section, three principles should be kept in mind:

(*a*) The principle declared in the *United States* v. *Wiltberger* (5 Wheat., 76), that—

> Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

See also *United States* v. *Lacher* (134 U. S., 624, 628).

(*b*) The degree of strictness applied to the construction of a penal statute depends in a great measure on the severity of the statute. "When it merely imposes a pecuniary penalty, it was construed less strictly than where the rule was invoked *in favorem vitae*." (Endlich Inter. Stat. sec. 334; 2 Lewis Suth. Stat. Con., sec. 518).

This section only renders a company civilly liable for $100 for a violation of the statute, and when the amount of the liability and the capacity of the companies to pay, and the little probability of the offense being committed when due precautions are used, are all considered, it is apparent that it can not be regarded as to any extent stringent or severe.

(*c*) When the section is remedial in its nature, as well as penal, it is to be liberally construed to effect the object which Congress had in view when making it.

This principle is well illustrated in the case of *Farmers, etc., Natl. Bank* v. *Dearing* (91 U. S., 29, 35), where the court had under consideration the thirtieth section of the national banking act, which provided that the knowingly taking, receiving, reserving, or charging a rate of interest greater than the amount specified, should be held a forfeiture of the entire interest which the evidence of debt carried with it, or which had been agreed to be paid thereon; and in case a greater amount of interest had been paid, the person paying the same or the representative might recover in an action for debt twice the amount of interest so paid from the person or association taking

or receiving the same. The court in speaking of this section said:

> The thirtieth section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it.

See also with reference to the same statute, *Ordway* v. *Central Natl. Bank of Baltimore* (47 Md., 217, 241).

While this section provides for a penalty, yet it is, along with the other provisions of the act, largely remedial, in that it was designed to aid in correcting the evil at which the act was directed, and in fact, is the chief weapon in accomplishing that purpose, as without it the act could never have been enforced.

3. *Section 6 certainly does not, by express language, except a violation of the statute which was not intentionally or knowingly done, nor is there anything therein which can permit such an exception by implication.*

This section says:

> Any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car *in violation of any of the provisions of this act,* shall be liable to a penalty of one hundred dollars, etc.

Therefore, the question as to whether or not a company has violated the act is not to be determined by the language of this section, but by the other sections, and when the facts show that the act has been violated, the liability under this section is fully made out; *and there is nothing in the language of this section by*

which the necessity of the presence of intent or knowledge can be implied.

If, therefore, knowledge of the violation, or an intention to violate the act, be a necessary ingredient of the right to recover the penalty, it must arise from some principle of law or statutory construction distinct from the principle which permits the reading into a certain clause of a statute, by reference to other sections and clauses thereof, words which have been omitted therefrom; and must depend upon some general principle, that in the construction of all criminal or penal statutes certain ingredients must be considered as making up the crime or the violation of the statute, whether the same be expressed therein or not.

4. *There is no general principle of statuatory construction which warrants, or will permit, the reading into section 6 of the statute the requirement that the violation of the other provisions shall be intentionally or knowingly done, in order to create the liability to the United States provided for in said section.*

But little consideration need be given to what technically constitutes a penal law, or the distinction between a penal and a civil procedure. By *Hepner* v. *United States* (213 U. S., 103) and *Oceanic Navigation Co.* v. *Stranahan* (214 U. S., 320) it is conclusively settled that this proceeding is a civil one. Moreover, strictly speaking, this is not a penal statute, in that it does not impose punishment for an offense committed against the State which the Executive has the power to pardon. *Huntington* v. *Attrill* (146 U. S., 657, 667).

Yet the statute does give to the United States the right to recover by civil action $100 in case a railroad company violates any of its provisions; and therefore, under the liberal definition which has been adopted by a great many courts, it is in a sense a penal statute, and a violation thereof may constitute, in a certain sense, an offense; but certainly it does not partake of the nature of a criminal offense, which implies turpitude and subjects the offender to imprisonment.

However, it is not deemed material whether it be of the nature of a criminal offense or not, as the principle above stated applies equally to those offenses which are criminal.

The contentions of counsel for plaintiff in error will be answered in the order in which they appear in their brief.

(1) *One can commit a crime or an offense even though he inflict no injury thereby upon anyone.*

But little attention need be given this proposition. To hold that the infliction of an injury upon some individual is a necessary element in a criminal offense, would be to declare wholly ineffective all laws against the speeding of automobiles and other vehicles, those which prohibit the storing of gunpowder and dynamite in public places, or the carrying of high explosives upon passenger trains, and every law of this character the purpose of which is to guard against the infliction of an injury.

It will be observed that the present law is designed for the same purpose as the laws of the charac-

ter above mentioned, in that its object was to *prevent* employees and travelers upon railroads from being injured.

(2) *Offenses created by statutes can be committed, though the intention to commit the wrongful act, and the knowledge of such act, be wanting.*

This question, it is insisted, was conclusively settled by this court in *Shevlin-Carpenter Co.* v. *State of Minnesota* (218 U. S., 57). In that case the supreme court of Minnesota had held that an offense could be committed under a certain statute without any intention to do so, and this holding of the court was recognized as correct in the above-mentioned opinion. As that case applies more directly to the constitutional question hereinafter discussed, it will be more fully analyzed and considered under that head.

The principle, however, that intent or knowledge is not a necessary ingredient of an offense created by statute, unless the statute either expressly or by implication requires its presence, is well recognized by the great weight of authority; and it may be illustrated by reference to the following cases and general authorities, which constitute but comparatively few of those in which this principle is declared:

In *Regina* v. *Woodrow* (15 Meeson & Welsby, 403, 417) it was held that a dealer in and retailer of tobacco was liable to a penalty imposed by a certain statute for having in his possession adulterated tobacco, although he had purchased it as genuine, and

had no knowledge or cause to suspect that it was so. As to the propriety of such a holding, Parke, B., said:

> It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so.

In *Commonwealth* v. *Emmons* (98 Mass., 6, 8) it was held that under a statute prohibiting a keeper of a billiard room from admitting thereto minors without consent of their parents or guardians, one was liable whether he knew such person to be a minor or not; the court saying:

> Nor was it material to show that the defendant did not know or have reason to believe that the alleged minors were under age. The prohibition of the statute is absolute. The defendant admitted them to the room at his peril, and is liable to the penalty, whether he knew them to be minors or not. The offense is of that class where knowledge or guilty intent is not an essential ingredient in its commission and need not be proved.

There are many other decisions of the Supreme Judicial Court of Massachusetts of the same character.

In *People* v. *Snowberger* (113 Mich., 86) it was held that under a statute which prohibited all persons from manufacturing for sale, offering for sale,

or selling, any article of food which was adulterated, one was liable for its violation whether he knew of the adulteration or not.

People v. *Roby* (52 Mich., 577) was a prosecution for selling whisky on Sunday. The sale was made by a clerk, and it was not shown that the defendant was present or knew anything about it. It was held, however, that he had violated a statute which required all places where liquors were sold to be kept closed on Sunday; and the court, speaking through Chief Justice Cooley, said:

> Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.

Numerous authorities were cited in support of the proposition, which are not referred to in this brief.

In *Edgar* v. *The State* (37 Ark., 219, 223) Edgar was indicted for violating a statute prohibiting the sale of liquor to minors, and it was held that—

> It was no justification or excuse for the defendant that when he sold the liquor, both he and the minor believed that the latter was of age. He sold it at his peril.

A like case was *Crampton* v. *The State* (id., 108).

In *State* v. *Sase* (6 So. Dak., 212) the same holding was made under a similar statute.

In *Maryland* v. *Baltimore & Susquehanna Steam Co.* (13 Md., 181, 187, 188) it was held that intention

or knowledge was not an essential ingredient of an offense under a statute which made it unlawful for any slave to be transported on any railroad or steamboat without permission in writing from the owner of such slave. The court in considering the policy of the act said:

> If the legislature deemed it expedient, in view of the grievance complained of, to hold persons responsible for transporting negroes, whether they were instigated by a criminal intent or not, they had the power to do so. Such acts may produce mischief in individual cases, but the inconvenience and injury would be much more general if, in every case of this kind, the party charged could defend himself by offering evidence that he did not know the negro was on board of the boat, and that reasonable diligence had been used to prevent such persons from coming on board.

And added:

> If one or the other must suffer, ought not the loss to fall on him who could most conveniently have prevented it?

The question was probably more thoroughly considered than elsewhere by the Court of Errors and Appeals of New Jersey in *Halstead* v. *State* (41 N. J. Law, 552, 591). Plaintiff in error in that case had been indicted for voting as a director of a county board of freeholders for the appropriation of public money in excess of the amount appropriated, in violation of a certain statute, and he interposed as a de-

fense that in so doing he acted in good faith and upon the advice of counsel; but after a full review of all the authorities the court held that, when an act in general terms is made indictable, a criminal intent need not be shown, unless from the language or effect of the law a purpose to require the existence of such intent can be discovered; and in attempting to reconcile the two classes of cases and declaring the duty of the courts in construing such statutes the court said:

> Now these two classes of cases, diverging as they do and seemingly standing apart from each other, may at first view appear to be irreconcilable in point of principle; but, nevertheless, such is not the case. They all rest upon one common ground, and that ground is the legal rules of statutory construction. None of them can legitimately have any other basis. They are not the products of any of the general maxims of civil or natural law. On the contrary, each of this set of cases is, or should have been, the result of the judicial ascertainment of the mind of the legislature in the given instance. In such investigations the dictates of natural justice, such as that a guilty mind is an essential element of crime, can not be the ground of decision, but are merely circumstances of weight, to have their effect in the effort to discover the legislative purpose. As there is an undoubted competency in the law maker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of

> necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention.

The general rule as laid down by Greenleaf (3 Greenleaf, 16 ed., sec. 21) is that—

> Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation.

And in the fourth note to this section numerous authorities, both English and American, are cited in support of this proposition.

The same view is taken by Wharton in his work on criminal law (8th ed., sec. 88), which will be hereafter quoted from at length.

It has generally been held that knowledge is not an essential ingredient of a violation of the United States revenue laws, unless the statute either expressly or by implication requires knowledge.

> *United States* v. *Bayaud* (16 Fed., 376, 384, 385.
>
> *United States* v. *Adler* (Fed., case No. 14424).

The most earnest opponent of this view is Mr. Bishop, and the reasons for his opposition are expressed at length in his New Criminal Law (8th ed.

vol. 1, secs. 287, 291, and note 6 to sec. 303*a*). But even he, in section 291, paragraph 2, is forced to say:

> And still from the special natures or small magnitudes of some wrongs redressed by indictment or penal action, the courts, deeming the intent immaterial in these particular instances, have refused to apply to them the common doctrine, employing language which has created a wide belief that they constitute exceptions. Some of the decisions now alluded to are evidently right, some others are certainly wrong.

And he cites in a footnote a number of decisions of the precise character of those above referred to. Which of these cases are right and which are wrong, and in what the distinction in principle between them consists, the learned commentator does not undertake to show.

(3) *The decisions of this court cited by counsel for plaintiff in errovr do not support their contention.*

Barlow v. *United States* (7 Pet., 404, 406) was an action to enforce the forfeiture of 85 hogsheads of sugar, which it was alleged had been entered for the benefit of drawback under a false denomination. The statute provided that such forfeiture should not be incurred if it should be made to appear to the satisfaction of the court that such false denomination happened by mistake or accident, and "*not from any intention to defraud the revenue.*" Of course, the vital question under this statute was

one of intent, and it was with reference to the case then in hand that the court said:

> For mistakes of fact the legislature might properly indulge a benignant policy, as they certainly ought, to accidents, etc.

which is quoted in plaintiff in error's brief.

The case of *Felton* v. *United States* (96 U. S., 699, 700, 702) is much relied upon by plaintiff in error. That was an action to recover the penalty of $1,000 under a statute which provided that if any distiller should "*knowingly and wilfully*" omit or neglect or refuse, or cause to be done, anything required by law in conducting his business, etc., if there were no specific penalty or punishment prescribed, he should pay a penalty of $1,000; and the complaint alleged that defendants "*knowingly and wilfully*" omitted, neglected, and refused to construct and maintain certain pipes, etc. It appeared that the defendants had placed a new still in their distillery, which proved to be too large for the capacity of the low-wine receiver, and as a consequence the receiver began to overflow. Defendants were ignorant of the want of capacity of the receiver until it was too late to remedy it for the distillation then taking place, and they caught the wines and dumped them into the vats for redistillation. The superintendent of the distillery made application to the assessor for permission to dump the low wines for redistillation, and the assessor telegraphed to the Commissioner of Internal Revenue, who refused the permission; but,

in the meantime, finding that the wines had overflowed, the assessor permitted a portion of the contents to be drawn off. The jury found the defendants guilty, but "accompanied their verdict with a finding that there was only a technical violation of the law, and that there was clearly no intention to defraud the Government thereby." Of course, under the statute and the complaint, it was essential to prove, before the penalty could be recovered, that the defendants had knowingly and wilfully failed to construct a cistern of sufficient capacity; and in considering this phase of the case, Mr. Justice Field, speaking for the court, said:

> So far from showing or tending to show that when the new still was made and placed in the distillery, the defendants, or any of their servants, had any knowledge of the incapacity of the receiver to hold all the wines that might be distilled on any day, it showed their ignorance of the defect until it was too late to remedy it for the distillation then taking place. There was, therefore, the absence of that knowledge which could render the neglect wilful, and therefore actionable. They must have "knowingly and wilfully" omitted to furnish a receiver of sufficient capacity, before the severe penalty prescribed could be imposed upon them and their distilled spirits subjected to forfeiture.

Reynolds v. *United States* (98 U. S., 145) was an indictment for bigamy, and it was contended that the

belief that polygamy was a divinely established institution, and that it was the defendant's duty to engage therein, afforded a good defense under the Constitution, although he knowingly married while a previous wife was living; and it was in connection with this question that the court said:

> A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does (p. 167).

What the court would have held had the defendant supposed his first wife was dead, when in fact she was still living, does not appear; but the Supreme Judicial Court of Massachusetts held in *Commonwealth* v. *Thomas* (11 Allen, 33), that where a woman married and lived but a short time with her husband, but was compelled to leave him on account of his dissipated habits, and afterwards read in a newspaper of a man being killed in a drunken row whom she had every reason to believe and did believe was her husband, and eleven years after she last saw or heard of him married another man, the second husband was guilty of adultery for cohabiting with her, when it turned out that the first one was still living.

In *United States* v. *Hess* (124 U. S., 483, 486), defendant was indicted for contriving a scheme to defraud persons by communications through the post office. Clearly, under this statute the intent to defraud was a necessary element; and in determining whether or not the indictment was sufficient, the court

quoted from *United States* v. *Cruikshank* (92 U. S., 542):

> A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

Pettibone v. *United States* (148 U. S., 197, 206), was an indictment under sections 5399 and 5440, Revised Statutes, for conspiring to obstruct the due administration of justice in a Circuit Court of the United States. The court held that the indictment should have charged knowledge or notice, or have set out facts to show knowledge or notice, on the part of the accused that the witness or officer who was to be intimidated was in fact a witness or officer in a court of the United States; and this requirement was based upon the principle that—

> in matters of contempt persons are not held liable for the breach of a restraining order or injunction, unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued, or the order entered, or at least that application is to be made; but without service of process or knowledge or notice or information of the pendency of proceedings, a violation cannot be made out;

and in the language quoted by counsel, the court had reference to this necessary intent or knowledge.

Davis v. *United States* (160 U. S., 469, 484), was a prosecution for murder, and the defense was insanity. The question was whether the jury should acquit if they had a reasonable doubt whether at the time of

the killing the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing, or whether when the facts were proven, making out a case of murder, the burden was on him to show positively that he wanted capacity to commit the crime. The court held that the doctrine of reasonable doubt should apply; and it was in defining the offense of murder that the language quoted by counsel was used, wherein it was said that—

> to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

In *Armour Packing Co.* v. *United States* (209 U. S., 56, 85), defendants were indicted for obtaining an unlawful concession from a certain freight rate in violation of the Elkins Act; and the language of the court quoted by counsel was used with reference to what intent or knowledge was sufficient to constitute the offense under the statute; and the court held that the fact that the shippers had knowledge of the rates published, and shipped the goods under the contention of their legal rights so to do, was all the knowledge or guilty intent necessary, and used the following language which is omitted from counsel's quotation, though it appears in its midst, its absence therefrom being indicated by stars:

> Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable

> under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law, is a question not decided because not arising on this record.

Consequently, counsel is able to cite no decision of this court which sustains their position; nor does there appear any authority which supports the contention that it is a universal rule of construction that knowledge or intent must be present to constitute a violation of a penal or criminal statute.

The general policy that Congresss had in view in passing this act, excludes the idea that it intended that knowledge of or intent to violate the provisions of the act should be necessary to create liability; and in the absence of a universal rule of construction, the provisions of section 6 of the act should be enforced as written.

5. *With the exceptions of the Circuit Court of Appeals, Sixth Circuit, in the case of United States v. Illinois Central Railroad Co. (170 Fed., 542), of Judge Evans in the trial court in the same case (156 Fed., 182), of Judge Sater in charging the jury in United States v. Baltimore & Ohio R. R. Co. (Appendix, Kent's Digest of Decisions under the Federal safety-appliance act, p. 271), and of Judge Cochran in charging the jury in United States v. Baltimore & Ohio R. R. Co. (Appendix Kent's Digest, 277, 282), all the Federal courts who have had before them actions brought under section 6 of this act to recover penalties have held that the statute imposes absolute liability upon the companies to not*

only equip the cars with safety appliances, but to keep such appliances in good repair, and that to haul a car with any of its appliances out of repair rendered the company liable for the prescribed penalty.

The following are the cases decided by Federal courts in which the statute has been so applied in penal cases:

United States v. *Denver & R. G. R. Co.* (163 Fed., 519). (C. C. A. 8th Cir.)

Chicago, M. & S. P. R. Co. v. *United States* (165 Fed., 423). (C. C. A. 8th Cir.)

United States v. *Southern Pac. Co.* (169 Fed., 407). (C. C. A. 8th Cir.)

Chicago, B. & Q. R. Co. v. *United States* (170 Fed., 556, 557). (C. C. A. 8th Cir.)

Atchison, T. & S. F. R. Co. v. *United States* (two cases) (172 Fed., 1021). (C. C. A. 8th Cir.)

Atlantic Coast Line R. Co. v. *United States* (168 Fed., 175). (C. C. A. 4th Cir.)

Norfolk & Western R. Co. v. *United States* (177 Fed., 623). (C. C. A. 4th Cir.)

United States v. *Phila. & R. R. Co.* (162 Fed., 403).

United States v. *Phila. & R. R. Co.* (id., 405).

United States v. *Pennsylvania R. Co.* (id., 408).

United States v. *Lehigh Valley R. Co.* (id., 410).

United States v. *Erie R. Co.* (166 Fed., 352).

United States v. *Wheeling & L. E. R. Co.* (167 Fed., 198).

United States v. *Atch. T. & S. F. R. Co.* (167 Fed., 696).

United States v. *Southern Pacific Co.* (id., 699).

United States v. *Baltimore & Ohio R. Co.* (170 Fed., 456).

United States v. *Southern Ry. Co.* (id., 1014).

United States v. *Baltimore & Ohio R. Co.* (Appendix, Kent's Digest, p. 274).

United States v. *Atlantic Coast Line* (Appendix, Kent's Digest, p. 267).

United States v. *Southern Ry. Co.* (Appendix, Kent's Digest, p. 270).

United States v. *Pennsylvania R. Co.* (Appendix, Kent's Digest, p. 286).

United States v. *Southern Pacific Co.* (Appendix, Kent's Digest, p. 288).

6. *Absolute liability for loss or damages, though such loss or damages can not be avoided by the utmost degree of diligence, has always in certain instances been recognized both at common law and under many statutes.*

On principle there can be no distinction between the imposition of a money penalty for an act which can not be avoided, and holding the person liable for loss or damages arising to another in consequence of such act. The general rule is that liability is based on some negligent act or omission of duty, and in both instances one is held liable without any fault upon his part. But that there can be liability for an act which can not by any possible foresight or the exercise of any degree of care be avoided, has always

been recognized. The following rules of the common law and cases decided by this court illustrate the principle.

Under the common law common carriers of property are liable as insurers of goods placed in their hands. The origin of that rule was thus explained by Lord Holt:

> This is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc. and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. (*Coggs* v. *Bernard*, 2 Ld. Raymond, 909.)

There is no moral reason why the employer should be responsible for the negligence of his employees. While the rule is said to be an outgrowth of the maxim *qui facit per alium facit per se*, such statement is not accurate. That maxim is based on the fact that the principal has directed the agent to do the very act which causes the injury, while the rule of *respondeat superior* holds the master responsible not for something he directed, but for something he did not direct, viz, the negligence of his servant; and the rule is therefore in direct conflict with the recognized moral rule that persons should not be charged with respon-

sibility for wrongs not their own. Although judges and writers are not in full accord as to the reasons which led to the adoption of the rule, the explanation given by Wood in his work on Master and Servant seems to be the most logical. It is as follows:

> While the interests of society on the one hand require that the right to act by another should be recognized, yet, upon the other hand, the same interests require that a person who does act by another should, so far as he has intrusted such person with authority to act for him, be responsible for the method and manner in which he exercises this power, thus *imposing upon the master the exercise of proper care and diligence in the selection and retention of his agents. The rule is predicated upon principles of justice and is sustained by sound public policy.* (Wood on Master and Servant, 2 ed., sec. 277.)

And whether or not this explanation is the only one, all agree that the rule is not one of morality, but merely one of expediency.

In *St. Louis, I. M. & S. R. Co.* v. *Mathews* (165 U. S., 1), this court upheld the validity of a law of Kansas making railroad companies absolutely liable for all fires set by their locomotives. It was claimed that despite all precautions sparks might escape from locomotives and cause fires, that railroads were authorized by law to operate locomotives, and that because it imposed liability for injuries which were the result of doing a lawful act in a lawful and careful manner, the act was "an arbitrary, unreasonable,

and unconstitutional exercise of legislative power." But this court said:

> *To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads.* When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property who has no control over or interest in those instruments.

In *Jones* v. *Brim* (165 U. S., 180), this court upheld a law of Utah imposing upon owners of herds of live stock absolute liability for all damages done to hillside highways through breaking down banks or rolling stones in driving such herds over them. In arriving at this conclusion the court said:

> In effect, the legislature declared that the passage of droves or herds of animals over a hillside highway was so likely, if great precautions were not observed, to result in damage to the road; that where this damage followed such driving, there ought to be no controversy over the existence or nonexistence of negligence, but that there should be an absolute legal presumption to that effect resulting from the fact of having driven the herd.

The reason underlying the right to impose absolute liability in each of the cases above referred to is that the imposition of such liability tends to promote the exercise of care. In every case, too, the injuries sought to be guarded against may occur notwithstanding the exercise of the utmost degree of care. A carrier may be robbed no matter what precautions he takes to prevent it; no amount of care on the part of the master in selecting and retaining servants will absolutely prevent those servants from being negligent; it is well known that the escape of sparks from locomotives is not altogether preventable in any way yet discovered; and no matter how careful an owner of a herd of live stock might be, some of the herd might break away and damage the road. But, nevertheless, the fact that the imposition of absolute liability tends to induce the exercise of care to prevent those injuries, is deemed sufficient to warrant the liability, even in those cases in which the injury may happen despite all care. That the imposition of absolute liability for injuries resulting from use of improper safety appliances will promote care in the maintenance of such appliances, is not open to fair dispute. Further, it is a much more effectual way of compelling care than would be any attempt to prescribe specifically how often or thoroughly appliances should be inspected, how they should be tested, under what circumstances they should be repaired or renewed, or other like conditions in respect to their maintenance. Indeed, the varying conditions on different railroads, on different parts of the same railroad, and

even in respect to different cars on the same part of the same railroad, make any attempt to lay down fixed rules on these subjects wholly impracticable. The only feasible method of meeting the situation is that adopted by Congress, viz, leaving to the railroads full discretion as to the ways and means of keeping their appliances in good order, but at the same time imposing upon them such liability in case of their failure to do so as will insure the exercise by them of the greatest care.

7. *The same policy which justifies the imposition of absolute liability for compensatory damages, justifies also the imposition of absolute liability for money penalties, and even criminal liability without the ingredient of knowledge or intent.*

In the cases above cited, wherein it was held that, under certain statutes, knowledge or intent was not a necessary element of the offenses created, the reason assigned by the courts for their enactment and for maintaining their validity was, that it was in consonance with sound public policy to require the highest degree of care in such matters, and that such a degree of care could not be otherwise exacted.

If a railroad company knows that it can not escape liability for damages on account of an injury by a defective safety appliance, it undoubtedly will use a higher degree of care in maintaining such appliances in proper condition, than if the rule of ordinary diligence applied. But, if its liability is limited to compensatory damages in case of actual injury, it might well conclude in many cases at least, that since

injuries only occasionally result from the use of defective safety appliances, it would be cheaper to pay damages arising therefrom than to exercise the utmost care in their inspection, repair, renewal, and use. It would be tempted to use a coupler or a grab iron until it actually gives out, instead of renewing it when it shows signs of wear and tear; to inspect only with ordinary frequency and with less thoroughness than would be possible, on the chance that even if it fails to discover defects no accident will happen, and to continue the rough handling of cars and the hauling of the heaviest possible trains, which places a tremendous strain upon the couplers, willing to run the risk of a defect arising therefrom, and the more remote risk that, if it should, it would be the proximate cause of an injury to an employee or traveler. But the public is interested not so much in the matter of compensation for injuries as in the prevention of injuries, and this result can be accomplished only by such measures as will remove all inducement for relaxing vigilance.

But it can hardly be said that this law exacts of a carrier an impossibility under any circumstances. In every case the carrier has the opportunity before it puts a particular car to a particular use to exercise its judgment as to the fitness of the car for that use, and if the safety appliances are out of order when the use begins the carrier should certainly be held responsible for not discovering that fact. The controversy arises only in cases when the appliances are in usable condition at the beginning of the use, but subsequently get out of order. But it is not enough for

the carrier to know when it selects a particular car for, and puts it to, a particular use that its safety appliances are *then* in working condition. It should know whether or not it is in condition to last throughout the use, or at least until it can be again inspected and repaired, should repairs be necessary. Otherwise the car is not fit for that use, and the carrier is quite as blameworthy as if the safety appliances had already become defective. A carrier should not be permitted to use grab irons and couplers until they actually break or wear out. Repairs and renewals should be made before the appliances actually become useless. But it is urged that a carrier can not know with certainty how long an appliance will last, and that therefore it should be held responsible as a voluntary violator of the law if the coupler or grab iron gives out while in use, if it in good faith thought it was in condition to last. But, if it can not know with certainty, it should take no chances. It should see that the appliances are properly made of good materials, and should heed the warnings given by the age of the appliance, the extent to which it has been used, the signs of wear and tear which it shows, and the rough treatment it has received. If an honest judgment is used and repairs and renewals are made whenever there is room to doubt the fitness of the appliance for use, the cases in which they become defective during a particular use are insignificant. Witness the case of car wheels and running gear. If they break, serious consequences are sure to follow, and therefore great precautions are taken. As a

result, the breakage of a car wheel or truck or axle while the car is in transit is practically unheard of.

II.

Congress has the constitutional power to impose a penalty for violation of the act, without the presence of knowledge of its violation, or the intent to violate the same.

This question is conclusively settled in *Shevlin-Carpenter Co.* v. *Minnesota* (218 U. S., 57, 64, 65, 67, 69). In that case the State of Minnesota sued to recover a certain sum for timber cut by plaintiff in error from certain lands in the State, without a valid and existing permit. The statute upon which the action was based provided that the State should recover treble damages if the trespass should be adjudged wilful, and double damages if it should be adjudged casual and involuntary. The trial court found that the trespass was wilful, and damages were assessed at treble the value of the timber, but the Supreme Court of the State found that—

> The finding of the trial court that appellant was guilty of wilful trespass is not sustained by the evidence. On the contrary, the record conclusively shows that appellant had reasonable ground for believing authority had been granted and honestly acted on such belief.

and hence entered judgment in favor of the State for double damages; and the controversy in this court was thus stated:

> This statement of the facts and the rulings of the courts of Minnesota exhibit the contro-

> versy, the State contending that the penalties of the statute are incurred by a casual or involuntary trespass; the plaintiffs in error insisting that to attach that consequence to acts done in good faith violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The act further provided that whoever should cut, or induce any other person or firm or corporation to cut, or remove, any timber from the State lands "contrary to the provisions of this act or without conforming in each and every respect thereto, shall be guilty of a felony," and be subject to punishment by fine not exceeding $1,000 or by imprisonment in the State prison not exceeding two years, or both, in case the trespass be adjudged to have been willful; and the State Supreme Court held that the criminal provision was applicable to both classes of offenders; that is, those who cut the timber willfully and those who cut it casually. Hence, the constitutional question was clearly presented whether the legislature could render a person liable for double damages, and at the same time make him guilty of an infamous offense for committing a trespass, when at the same time he had no knowledge that it was a trespass, and verily believed that he was legally entitled to cut the timber.

The following quotations from this court's opinion are specially pertinent:

> The next contention of plaintiffs in error is that "both the provisions of section 7 make a casual and involuntary trespasser liable to the State in double damages, and that declaring

his act a felony violates the Fourteenth Amendment" because those provisions "eliminate altogether the question of intent," and that the "elimination of intent as an element of an offense is contrary to the requirements of due process of law." To support the contention plaintiffs in error attack the power of a legislature to make an innocent act a crime, and say that the "principle that the legislature cannot, by its mere fiat, make an act otherwise innocent a crime, and punishable as such, is one to which this court will give effect, even though it be not expressly enunciated by the Constitution." The principle as thus expressed is very general, and takes no account of whether a law have prospective or retrospective operation. It would seem, therefore, to destroy the well-recognized distinction between *mala in se* and *mala prohibita*. The principle contended for is probably not intended to be taken so broadly, and its generality is further limited by concession that it may have exceptions "where so-called criminal negligence supplies a place of criminal intent, or where, in a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent." A concession of exceptions would seem to destroy the principle.

* * * * *

When the permit was issued plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression.

The State sought to guard against its wilful or accidental abuse. Permits had been abused

and the lands of the State despoiled of their timber. The offenders were difficult to detect, or, if detected, the character of their acts, whether wilful, accidental or involuntary, equally difficult to establish, and the State, the Supreme Court said, had been "defrauded and robbed of large sums of money." Double and treble damages and a criminal prosecution were provided to meet the situation. It would be strange indeed if it were not within the competency of the legislature. To hold otherwise would take from the legislature the power to adjust legislation to evils as they arise and to the ways by which they may be effected.

* * * * *

We do not understand the position of plaintiffs in error to be that a legislature may not prescribe a larger measure of damages than simple compensation, but that anything in excess of such compensation is punishment and cannot be constitutionally prescribed where there is no "conscious intent" to do wrong. And yet plaintiffs in error except from the principle "certain instances within the police power," overlooking that the principle, if it exist at all, must be universal. It is true that the police power of a state is the least limitable of its powers, but even it may not transcend the prohibition of the Constitution of the United States. If, as contended, intent is an essential element of crime, or more restrictively, if intent is essential to the legality of penalties, it must be so, no matter under what power of the State they are prescribed. Plaintiffs in error, while considering there

> may be exceptions to the principle contended for in the exercise of the police power, urge that the legislation in controversy is not of that character. The Supreme Court of the State, however, expressed a different view. It decided that the legislation was in effect an exercise of the police power, and cited a number of cases to sustain the proposition that public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance. Those cases are set forth in the opinion of the court and some of them reviewed.
>
> We will not repeat them. It was recognized that such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh.

This decision is clearly conclusive of the present question. The court there held that the fourteenth amendment of the Constitution which prohibits States from depriving any person of life, liberty, or property, without due process of law, does not prevent a State legislature from declaring an act a criminal offense, though it may be committed ignorantly and without any criminal intent. There is no limitation set upon the power of Congress to legislate with reference to interstate commerce, unless it be by the fifth amendment to the Constitution, which prohibits the United States

from depriving anyone of life, liberty, or property without due process of law. Learned counsel have not suggested any other provision which can possibly deprive Congress of the power to make it unlawful for a railroad company engaged in interstate commerce to haul a car having defective safety appliances, and to make the company liable for a penalty for such violation, though it may have been done ignorantly and unintentionally. But the prohibition against the States, as set forth in the fourteenth amendment, is in the same language as that against the United States in the fifth amendment; and if, therefore, the legislatures of the several States have such power, as held in the Shevlin-Carpenter case, then the same power is vested in Congress.

The constitutional power of a legislative body to pass an act of this character is thus discussed in Wharton Criminal Law (8th ed., sec. 88):

> That to constitute an offense at common law it must be shown that the defendant acted either negligently, or with evil intent, may be considered as settled. The question before us, however, is, whether the legislature may constitutionally make an act indictable irrespective of guilty knowledge. It will scarcely be doubted that this is the case with police offenses. It may be indispensable to public safety that storing of gunpowder or of highly imflammable oils in exposed localities should be prohibited; and as in such cases the statutes could be easily eluded if a *scienter* be requisite to conviction, the policy that requires

the enactment of the statute requires also that the statute should relieve the prosecution from proving a *scienter*. Sometimes this is done by an express clause in the statute, as where a woman concealing the death of a bastard child was, by the old statutes, "deemed" to have been concerned in killing it, and where it is provided that persons selling spirituous liquors shall be "deemed" common sellers of the same, or that delivery of such liquors shall be proof of sale, or that persons carrying concealed weapons shall be presumed to carry them knowingly. Such provisions are constitutional, as concerning matters of process, and are illustrated by statutes prescribing that a person not heard of for a specific period shall be presumed to be dead, and that debts not acknowledged within a specific period shall be presumed to be paid. If this can be done by an express clause, it can be done by implication; and if so, where the legislature imposes a specific penalty on a person doing a particular thing, irrespective of *scienter*, it will be the duty of the courts to enforce the prohibition. The question is one of policy; and this may be taken into consideration when the legislative meaning is sought. That a man should be convicted of a malicious act without proof of malice, or of a negligent act without proof of negligence, is of course an enormity which no legislature could be supposed to direct. But it is otherwise as to certain mischievous acts which it may be a sound policy to prohibit arbitrarily, because they imperil public safety

(as, for example, the selling of intoxicating drinks and defective storing of explosive compounds), and because to require *scienter* to be proved would be to defeat the object of the statutes, since in many cases, and those the most dangerous of the class, it would be out of the power of the prosecution to prove *scienter* beyond reasonable doubt. The legislature may properly say, "In such cases we presume *scienter;* whoever deals with these dangerous agencies does so at his risk." The same reasoning applies to illicit intercourse with young girls, a case above given. The act is itself an invasion of good morals, and if indulged in brings with it its own risks. Even at common law ignorance as to aggravating facts cannot be set up as a defense, as, on a trial for burglary, is the case with ignorance that the building entered was a dwelling-house. *A fortiori* is this the case when a statute, on grounds of public policy, makes *scienter* irrelevant. It is also to be observed that to declare that honest ignorance of facts is a defense would extend the same privilege, in many cases, to honest ignorance of law. Ignorance, for instance, that the State prohibits by indictment dealing with minors is morally as good a defense, in cases where the party dealt with has apparently reached majority, as is ignorance that such party is a minor. In both cases the defendant is ignorant that he is doing an illegal thing. That in the former case it is conceded that such ignorance is no defense shows that honest belief that an illegal

> act is legal is no necessary ground for acquittal. We cannot, therefore, lay down the rule that ignorance of inculpatory facts shall be always a defense, without extending the same immunity to ignorance of inculpatory law. And if we cannot so extend this immunity, then we must hold that ignorance does not necessarily acquit when *scienter* is not an essential of the offense. (Pp. 121–123.)

The following cases also illustrate the power of a legislature to enact an extreme law, because its general effect is to promote the public welfare through the exercise of great diligence.

In *St. John* v. *New York* (201 U. S., 633), a law of New York imposing absolute liability for selling adulterated milk upon nonproducing milk venders, although producing venders were allowed to exonerate themselves from liability by showing that the milk as sold was in the same condition as when it left the herd, was held not to deny to the nonproducing venders equal protection of the law; that the imposition of absolute liability in their case was defensible upon the ground that unless strict liability was imposed evasions of the law might be accomplished, because it would be difficult to show where they got their milk and like matters, while in the case of producing venders no such difficulties would exist. If the preventing of evasions of law is a sufficient basis for classification, it is difficult to see why like reasons are not sufficient warrant for imposing liability to penalties even in cases where no moral blame attaches.

In *New York* v. *Herstberg* (211 U. S., 31), it was contended that a law of the State of New York punishing any one having in his possession certain kinds of game at certain seasons was in excess of the State's power, because the State could only legislate for the protection of its own game, while the prohibition extended to foreign game as well, and particularly to foreign game which was readily distinguishable from domestic game, so that the domestic game could have been amply protected by inspection laws and other like measures which would have protected domestic game without interfering with the sale of foreign game. In reply to this argument the court said:

> In order to protect the local game during the closed seasons it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. In other states of the Union such laws have been deemed essential, and have been sustained by the courts (citing cases). It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind, under the claim that they were taken in another state or country. The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game, in the interest of the food supply of the people of the state. We cannot say that such purpose frequently recognized and acted upon, is an abuse of the police power of

the state, and, as such, to be declared void because contrary to the 14th amendment to the Constitution.

The constitutionality of the act may also be maintained on the ground that it creates a conclusive presumption of negligence arising from the use of the improper appliance.

In *Jones* v. *Brim* (*supra*) a statute imposing absolute liability for injuries to hillside highways resulting from the breaking down of banks and rolling rocks in driving herds of live stock over them was held to simply create a conclusive presumption of negligence arising from the fact of injury to the highway; and for that reason it was declared not to unjustly discriminate between owners of herds of live stock and owners of single animals. The court reached the conclusion that the statute created only a presumption of negligence because it was obvious from the nature of the injury dealt with, viz, the breaking down of banks and rolling of stones onto the highways, that they could not occur unless the cattle were allowed to leave the highway, and that, whether or not it was possible to prevent that in any case was a question so difficult of determination that it was proper for the legislature to declare that it should not be open to debate. Precisely the same reasoning applies here. If a grab iron or coupler becomes insecure or inoperative, it must be either because it was originally defective in materials or workmanship, or because it was improperly handled, or not inspected, or used too long, or damaged as a result of some accident occurring during the particu-

lar use. Railroads should guard against all these contingencies. But whether or not they have done all that could be done in that respect in some particular case can never be accurately determined. It would be practically impossible to follow the appliance from the time of its manufacture to the time it gets out of order. Even if its movements could be accurately traced it would be impossible always to find those who had to do with its manufacture, inspection, and handling. If they were found, it would be absurd for them to attempt to testify with certainty whether or not the defect causing the final giving out of the appliance was due to anything occurring while in their charge.

Since, therefore, the power to pass this act was vested in Congress, the following language of this court in *McCray* v. *United States* (195 U. S., 27, 53), is pertinent:

> Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within the power conferred was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.

For the foregoing reasons, the judgment of the trial court and of the circuit court of appeals, eighth circuit, should be affirmed.

J. A. FOWLER,
Assistant Attorney General.
BARTON CORNEAU,
Special Assistant to the Attorney General.

JANUARY, 1911.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 329. Argued March 9, 1911.—Decided May 15, 1911.

Under the Safety Appliance Acts of March 2, 1893, c. 196, 27 Stat. 531, April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943, there is imposed an absolute duty on the carrier and the penalty cannot be escaped by exercise of reasonable care.

This court in *St. Louis, I. M. & S. Railway Co.* v. *Taylor*, 210 U. S. 281, considered and determined the scope and effect of the Safety Appliance Acts and the degree of care required by the carrier, and the question is not open to further discussion, as this court should not disturb a construction which has been widely accepted and acted upon by the courts.

For this court to give a construction to an act of Congress contrary to one previously given would cause uncertainty if not mischief in the administration of law in Federal courts, and, having placed an interpretation on the Safety Appliance Acts, this court will adhere thereto until Congress by amendment changes the rule announced in *St. Louis, I. M. & S. Railway Co.* v. *Taylor, supra.*

An action for penalties under the Safety Appliance Acts is a civil, and not a criminal one, and the enforcement of such penalties is not governed by considerations controlling prosecution of criminal offenses.

Congress has unquestioned power to declare an offense and to exclude the elements of knowledge and due diligence from the inquiry as to its commission.

170 Fed. Rep. 556, affirmed.

THE facts, which involve the construction of the Safety Appliance Acts, and the duties and liabilities of carriers to equip their cars with safety appliances, are stated in the opinion.

Mr. Ralph W. Breckenridge, with whom *Mr. Charles J. Greene* was on the brief, for petitioner:

The Government cannot recover. It appears not only

that the Railway Company did not know that its cars were defective tested by the act, and there was no intention to offend—but that the company exercised reasonable care to keep its cars repaired. *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, does not discuss the liability of railway companies to the Government, whether or not they comply with the terms of the act. Whether or not all that the court said was necessary to a decision of the case then before the court, it was intended to apply only to the relation of master and servant, and ought not to be interpreted otherwise nor in any event applied to other situations.

The Safety Appliance Acts do not disclose the intent of Congress to make railroad companies insurers of the safety of their employés.

Section 8 creates a new relationship as between master and servant only to the extent that a servant is not required to assume a defective condition of equipment when known to him, as a hazard of his employment. Congress intended that the right of recovery for an injury should depend upon the negligence of the railroad company and the freedom from negligence of the injured person.

In this case no injury had befallen anyone, there was absence of intent, and the offense was established by construction.

Although a penalty can be recovered in a civil action, *Hepner* v. *United States*, 213 U. S. 103,—if the statute upon which it is grounded is a penal statute, the defendant is entitled to have actual ignorance of the defective conditions, exercise of reasonable care to prevent the same, and absence of intention to violate that statute, considered as a defense.

There was no indictment, but the court treated the petition to recover the penalty as though it were an information authorized by the criminal procedure in the Federal courts, and it is not open to the United States, as a litigant,

to claim any advantage based upon such a technical consideration as that involved in the mere form of the action it selected. To select a form of procedure that forecloses a defense is abhorrent to the sense of justice. *Huntington* v. *Attrill*, 146 U. S. 657, 668.

A penalty is none the less a penalty and the statute which imposes it is none the less a penal or criminal statute because the penalty may be recovered in an action which is civil in its form. The difference between the civil and criminal prosecution of corporations is slight. *United States* v. *Illinois Central Ry. Co.*, 156 Fed. Rep. 182; *Ex parte Kentucky* v. *Dennison*, 24 How. 66; *United States* v. *Reisinger*, 128 U. S. 308; *Boyd* v. *United States*, 116 U. S. 616, 634; *Iowa* v. *C., B. & Q. R. R. Co.*, 37 Fed. Rep. 497; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Grafton* v. *United States*, 206 U. S. 333, 353; *Moore* v. *State of Illinois*, 14 How. 13; *Shick* v. *United States*, 195 U. S. 65.

The construction of the Safety Appliance Act, pursuant to which penalties have been adjudged against the Railway Company, violates the social compact. *United States* v. *Wiltberger*, 5 Wheat. 77, 95; *United States* v. *Lacher*, 134 U. S. 624.

There can be no constructive offenses. *Todd* v. *United States*, 158 U. S. 278, 282; *Calder* v. *Bull*, 3 Dallas, 386; The Federalist, No. 84; *McVeigh* v. *United States*, 11 Wall. 259, 267; *Loan Association* v. *Topeka*, 20 Wall. 655, 662.

No tyranny could be more intolerable and hateful and no power more despotic than the punishment of an American citizen or corporation for something which the accused did not know had occurred, and was using diligence to avoid.

For the history of the original act adopting safety appliances on railroads engaged in interstate commerce, see Report House Committee on Interstate and Foreign Commerce, 52nd Congress, to which had been referred sundry bills on the subject, on July 8, 1892 (Vol. 23, Cong. Rec.

pt. 6, p. 5925); H. R. bill 9350, with recommendation that it pass. The committee bill was passed under suspension of the rules without debate. 23 Cong. Rec. 5925, 5927. After the initial proceedings had in the House on July 9, 1892, H. R. bill 9350, was referred to the Senate Committee on Interstate Commerce, 23 Cong. Rec. 5932, July 21, and the Senate Committee reported the bill with a substitute. Rec. 6483. The report of the Senate Committee was presented July 22, 1892, p. 6552, and appears in Vol. 24, pp. 1246, 1247, and see address on February 6, of Senator Cullom, chairman of the Senate Committee on Interstate Commerce, 24 Cong. Rec. 1247, 1248, 1249, 1273, 1275, 1287; see also remarks of Senator (now Mr. Chief Justice White), 24 Cong. Rec. 1277, 1280, 1284; and of Senator Hoar, 24 Cong. Rec. 1287–1288.

The substitute bill of the Senate Committee passed the Senate February 11, 1893, 24 Cong. Rec. 1486; February 27, 1893, the House concurred in the Senate amendments (Cong. Rec., Vol. 24, pp. 2247, 2248); and the bill received executive approval on March 2, 1893 (Cong. Rec., Vol. 24, p. 2457).

If the Safety Appliance Act prescribes a rule or regulation for cars that were equipped as the law required at the commencement of their journey and which were inspected for defects in their equipment at the repair station last preceding the one where defects were found, and which were crippled by unavoidable accident en route, such regulation rests upon judicial construction and judicial legislation, for it cannot be deduced from the arguments of the distinguished gentlemen who took part in the discussion in the House and Senate upon this act, prior to its passage.

There can be no crime or offense where there is no injury. In none of the cases complained of was any injury suffered by any person. 2 Wilson's Works (Andrews' ed.), 338. No criminal offense can be committed where the intention to do or permit the wrongful act is wanting. 1 Bishop on

Criminal Law, 5th ed., § 345; *People* v. *White*, 34 California, 183; *Furley* v. *Chicago, M. & St. P. Ry. Co.*, 90 Iowa, 146; *Schmidt* v. *State*, 78 Indiana, 41; *Hunter* v. *State*, 101 Indiana, 241; McLain on Criminal Law, § 128; *United States* v. *Illinois Central R. R. Co.*, 156 Fed. Rep. 182; *S. C.*, 170 Fed. Rep. 542; *Pettibone* v. *United States*, 148 U. S. 197; *Reynolds* v. *United States*, 98 U. S. 145.

One cannot be convicted of a crime based upon an accidental occurrence. *Barlow* v. *United States*, 7 Pet. 404; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Cruikshank*, 92 U. S. 542; *Davis* v. *United States*, 160 U. S. 469, 484; *Felton* v. *United States*, 96 U. S. 699.

Even in cases involving no moral turpitude, there must be an intention to do the act which constitutes a violation of law. *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1; *S. C.*, 209 U. S. 56, 85.

No question is raised here of a mistake of law; there was not only no purpose to do or permit the prohibited thing, but an intent not to do it, and an honest effort by the exercise of reasonable diligence, to obey the law, and prevent the very conditions which occurred, and which were in fact incidental to and accidents of, the movement of the cars.

Mr. Assistant Attorney General Fowler, with whom *Mr. Barton Corneau*, special assistant to the Attorney General, was on the brief, for the United States:

The act of March 2, 1893 (c. 196, 27 Stat. 530), as amended by the act of March 2, 1903 (c. 976, 32 Stat. 943), makes it unlawful for any car to be hauled on a railroad engaged in interstate commerce, with safety appliances not in a usable condition; and § 6 of said former act, which provides for the recovery by the United States of a penalty of $100 for a violation of any of the provisions of the act, likewise extends to the maintenance of appliances, and in case of violation makes the liability of the company for such penalty absolute, regardless of whether the statute

was violated with the knowledge of any employé of the company or not.

The provisions of the statute other than § 6 require that the appliances be maintained in a usable condition, and said section should be applied to them as thus construed. 36 Cyc. 1183; 2 Lewis, Suth. Stat. Con., 2d ed., § 337; Endlich, Inter. Stat., § 332; *United States* v. *Keitel*, 211 U. S. 370, 392.

Section 6 should not within itself be strictly construed. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Lacher*, 134 U. S. 624, 628.

When a penal statute merely imposes a pecuniary penalty it is construed less strictly than where the rule was invoked *in favorem vitæ*. Endlich, Inter. Stat., § 334; 2 Lewis, Suth. Stat. Con., § 518.

When the section is remedial in its nature, as well as penal, it is to be liberally construed to effect the object which Congress had in view when making it. *National Bank* v. *Dearing*, 91 U. S. 29, 35; *Ordway* v. *Central Nat. Bank*, 47 Maryland, 217, 241.

Section 6 certainly does not, by express language, except a violation of the statute which was not intentionally or knowingly done, nor is there anything therein which can permit such an exception by implication.

There is no general principle of statutory construction which warrants, or will permit, the reading into § 6 of the statute the requirement that the violation of the other provisions shall be intentionally or knowingly done, in order to create the liability to the United States provided for in said section. This proceeding is a civil one. *Hepner* v. *United States*, 213 U. S. 103; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320.

This is not a penal statute, as it does not impose punishment for an offense committed against the State which the executive has the power to pardon. *Huntington* v. *Attrill*, 146 U. S. 657, 667.

One can commit a crime or an offense even though he inflict no injury thereby upon anyone.

Offenses created by statute can be committed, though the intention to commit the wrongful act, and the knowledge of such act, be wanting. *Shevlin-Carpenter Co.* v. *State of Minnesota*, 218 U. S. 57; *Regina* v. *Woodrow*, 15 Meeson & Welsby, 403, 417; *Commonwealth* v. *Emmons*, 98 Massachusetts, 6, 8; *People* v. *Snowberger*, 113 Michigan, 86; *People* v. *Roby*, 52 Michigan, 577; *Edgar* v. *The State*, 37 Arkansas, 219, 223; *Crampton* v. *The State*, 37 Arkansas, 108; *State* v. *Sase*, 6 So. Dak. 212; *State* v. *Baltimore & S. Steam Co.*, 13 Maryland, 181, 187, 188; *Halstead* v. *State*, 41 N. J. Law, 552, 591; 3 Greenleaf, 16th ed., § 21; Wharton on Crim. Law, 8th ed., § 88.

Knowledge is not an essential ingredient of a violation of the United States revenue laws, unless the statute either expressly or by implication requires knowledge. *United States* v. *Bayaud*, 16 Fed. Rep. 376, 384, 385; *United States* v. *Adler*, Fed. Case, No. 14,424; *Contra*, 1 Bishop, New Criminal Law, 8th ed., §§ 287, 291, and note 6 to § 303*a*. But see § 291, par. 2.

The decisions of this court cited by counsel for plaintiff in error do not support their contention. See *Barlow* v. *United States*, 7 Pet. 404; *Felton* v. *United States*, 96 U. S. 699, 700, 702; *Reynolds* v. *United States*, 98 U. S. 145; *Commonwealth* v. *Thomas*, 11 Allen, 33; *United States* v. *Hess*, 124 U. S. 483, 486.

The general policy that Congress had in view in passing this act, excludes the idea that it intended that knowledge of or intent to violate the provisions of the act should be necessary to create liability; and in the absence of a universal rule of construction, the provisions of § 6 of the act should be enforced as written.

With the exceptions of the Circuit Court of Appeals, Sixth Circuit, in the case of *United States* v. *Illinois Central Railroad Co.* (170 Fed. Rep. 542), of Judge Evans in

the trial court in the same case (156 Fed. Rep. 182), of Judge Sater in charging the jury in *United States* v. *Baltimore & Ohio R. R. Co.* (Appx. Kent's Dig. of Decisions under the Federal Safety Appliance Act, p. 271), and of Judge Cochran in charging the jury in *United States* v. *Baltimore & Ohio R. R. Co.* (Appx. Kent's Dig., 277, 282), all the Federal courts who have had before them actions brought under § 6 of this act to recover penalties have held that the statute imposes absolute liability upon the companies to not only equip the cars with safety appliances, but to keep such appliances in good repair, and that to haul a car with any of its appliances out of repair rendered the company liable for the prescribed penalty.

The following are the cases decided by Federal courts in which the statute has been so applied in penal cases: *United States* v. *Denver & R. G. R. Co.*, 163 Fed. Rep. 519; *Chicago, M. & S. P. R. Co.* v. *United States*, 165 Fed. Rep. 423; *United States* v. *Southern Pac. Co.*, 169 Fed. Rep. 407; *Chicago, B. & Q. R. Co.* v. *United States*, 170 Fed. Rep. 556, 557; *Atchison, T. & S. F. R. Co.* v. *United States* (two cases), 172 Fed. Rep. 1021; *Atlantic Coast Line R. Co.* v. *United States*, 168 Fed. Rep. 175; *Norfolk & Western R. Co.* v. *United States*, 177 Fed. Rep. 623; *United States* v. *Phila. & R. R. Co.*, 162 Fed. Rep. 403; *United States* v. *Phila. & R. R. Co.*, 162 Fed. Rep. 405; *United States* v. *Pennsylvania R. Co.*, 162 Fed. Rep. 408; *United States* v. *Lehigh Valley R. Co.*, 162 Fed. Rep. 410; *United States* v. *Erie R. Co.*, 166 Fed. Rep. 352; *United States* v. *Wheeling & L. E. R. Co.*, 167 Fed. Rep. 198; *United States* v. *Atch., T. & S. F. R. Co.*, 167 Fed. Rep. 696; *United States* v. *Southern Pacific Co.*, 167 Fed. Rep. 699; *United States* v. *Baltimore & Ohio R. Co.*, 170 Fed. Rep. 456; *United States* v. *Southern Ry. Co.*, 170 Fed. Rep. 1014; *United States* v. *Baltimore & Ohio R. Co.*, App. Kent's Dig. 274; *United States* v. *Atlantic Coast Line*, App. Kent's Dig. 267; *United States* v. *Southern Ry. Co.*, App. Kent's Dig. 270; *United*

States v. *Pennsylvania R. Co.*, App. Kent's Dig. 286; *United States* v. *Southern Pacific Co.*, App. Kent's Dig. 288.

Absolute liability for loss or damages, though such loss or damages cannot be avoided by the utmost degree of diligence, has always in certain instances been recognized both at common law and under many statutes. Wood on Master and Servant, 2d ed., § 277; *St. Louis, I. M. & S. R. Co.* v. *Mathews*, 165 U. S. 1; *Jones* v. *Brim*, 165 U. S. 180.

Congress has the constitutional power to impose a penalty for violation of the act, without the presence of knowledge of its violation, or the intent to violate the same. *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 64, 65, 67, 69.

MR. JUSTICE HARLAN delivered the opinion of the court.

Two separate actions were brought by the Government in the District Court of the United States for the District of Nebraska against the Chicago, Burlington and Quincy Railroad Company, an Iowa corporation engaged as a common carrier in interstate commerce. The object of each action was to recover certain penalties which, the United States alleged, had been incurred by the company for violations, in several specified instances, of the Safety Appliance Acts of Congress. March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943. By consent of the parties and by order of court the two actions were consolidated and tried together. At the trial the court directed a verdict of guilty as to each cause of action, and a judgment for $300 was rendered for the Government in one case and for $100 in the other.

By the original act of March 2, 1893 (27 Stat. 531), it was provided that from and after the first day of January, eighteen hundred and ninety-eight, it should be unlawful for any common carrier engaged in moving interstate

traffic by railroad to use on its line any locomotive engine not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or, after that date, to run any train in such traffic that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

The second section provided "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Section 6, as amended April 1, 1896, c. 87, 29 Stat. 85, provided that any such common carrier using a locomotive engine, running a train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act "shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed. . . . *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

The eighth section is in these words: "That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the

risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

After referring to various cases holding that the omission of Congress to make knowledge and diligence on the part of the carrier ingredients of the act condemned, the trial court said: "Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employés, provided the accident occurs from a defective appliance such as is designated in this act. And for these reasons the jury will be peremptorily instructed to return a verdict for the Government on each count of the indictment." In the Circuit Court of Appeals that judgment was affirmed. In the course of its opinion the latter court said: "The cause is simplified by the concession of counsel for the Railway Company that there was evidence tending to prove the defective condition of each of the four cars as charged, and that they were all being used at the time stated in the several counts in hauling interstate commerce or as a part of a train containing other cars which were doing so. The sole contention is that, notwithstanding this concession, inasmuch as it appears by the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law, but on the contrary had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. Learned counsel concede, what is undoubtedly true, that sustaining their contention involves a reversal of the doctrine unanimously declared by this court [Circuit Court of Appeals for Eighth Circuit] in *United States* v. *Atchison, T. & S. R. Ry. Co.*, 163 Fed. Rep. 517, and *United States* v. *Denver & Rio Grande R. R. Co.*, 163 Fed.

Rep. 519, and a disregard of what they call the dictum of the Supreme Court in *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; and they accordingly invite us to enter upon a reconsideration of the questions so decided. It was held by us, and in our opinion it was necessarily held by the Supreme Court in the *Taylor Case*, that the duty of railroads under the statute in question is an absolute duty and not one which is discharged by the exercise of reasonable care and diligence. Since those cases were decided, this court in the case of *Chi., Mil. & St. P. Ry. Co.* v. *United States*, 165 Fed. Rep. 423, has again approved of their doctrine, and the Circuit Court of Appeals for the Fourth Circuit in the case of *Atlantic Coast Line R. R. Co.* v. *United States*, decided March 1, 1909, 168 Fed. Rep. 175, in considering this question, made a review of pertinent authorities, and particularly of the cases of this court as well as of the *Taylor Case*, and in an exhaustive opinion reached the same conclusion that we did. . . . The act made it unlawful for railroads to use cars not equipped as therein provided and thereby imposed a duty upon railroad companies to equip cars accordingly. This was by clear and unequivocal language of the lawmaker made an absolute duty not dependable upon the exercise of diligence or the existence of any wrong intent on the part of the railroad companies. Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know they were in order and kept in order at all times. (Cases *supra*.) A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed the liability, not as a punishment for a criminal offense, but as a civil consequence, so far as the Government was concerned, of a failure to perform the duty which, in the opinion of Congress, the public weal demanded should be performed by railroad companies." 170 Fed. Rep. 556.

Does the act of Congress in question impose on an inter-

state carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars? Can the carrier engaged in moving interstate traffic escape the penalty prescribed for a violation of the act, in the particulars just mentioned, by showing that it had exercised reasonable care in equipping its cars with the required coupler, and had used due diligence to ascertain, from time to time, whether such cars were properly equipped?

The court below held that an explicit answer to the above questions was to be found in *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281. The Government insists that such was the effect of the decision of that case. The defendant contends that the questions here presented were not necessary to be decided in the *Taylor Case*, and that an examination of them now is not precluded by anything involved in that case.

Under the circumstances and because of the importance of the questions raised, it seems appropriate, if not necessary, to state the origin of the *Taylor Case* and the grounds upon which this court proceeded.

Neal, as administrator of the estate of Taylor, brought an action in an Arkansas court against the St. Louis, Iron Mountain & Southern Railway Co. to recover damages for the death of Taylor, one of its employés, whose death, it was alleged, had been caused by the company's failure to provide certain safety appliances required by the act of Congress. Pursuant to the direction of the state court a verdict was returned for the railway company. The case was taken to the Supreme Court of Arkansas, and that court decided that the act of Congress departed from or supplanted that general rule obtaining between master and servant, which protected the master, when charged with the failure to have safe machinery for the servant,

if it appeared that the master used reasonable care and diligence in providing suitable and safe appliances. "But," that court said, "it is different where the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height, but it imposes as a positive duty upon railway companies that they shall do so. . . . The act of Congress requiring railroad companies to equip their cars with drawbars of standard and uniform heights specifically provides that an employé injured by the failure of a company to comply with the act shall not be deemed to have assumed the risk by reason of his knowledge that the company had not complied with the statute, and there is no question of assumed risk presented." The Supreme Court of the State was therefore of opinion that the trial court had not correctly interpreted the act of Congress in respect of the nature of the duty imposed by the statute on the railroad company, and directed the case to be sent back for a new trial. *Neal* v. *St. Louis, I. M. & S. Ry. Co.*, 71 Arkansas, 445, 450. The second trial was conducted on the basis of the principles announced by the Supreme Court of Arkansas in that case. At the second trial the railway company asked the court to instruct, but the court refused to instruct, the jury as follows: "The court tells you that if you find from the evidence in this case the defendant equipped all its cars with uniform and standard height drawbars when such cars are first built and turned out of the shops, then the defendant is only bound *to use ordinary care* to maintain such drawbars at the uniform and standard height spoken of in the testimony." This was designated as instruction No. 23, asked by the railway company. It appears at page 126 of the original record, on file in this court, of the *Taylor Case.* At the last trial there was a verdict in the state court against the railway company. The company appealed to the Supreme

Court of Arkansas, where the judgment was affirmed. *St. Louis, I. M. & S. Ry. Co.* v. *Neal*, 83 Arkansas, 591, 598.

The railway company prosecuted a writ of error to this court, and the case is reported as *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281. It was assigned by the company for error, and its counsel insisted that the trial court erred in refusing the above instruction, No. 23, and that the Supreme Court of the State erred in not so ruling. (Original record, p. 154.) The reason assigned in support of that view was that "a reasonable construction of the Safety Appliance Act is that if the railroad company equipped all its cars with uniform and standard height drawbars when such cars were first built and turned out of the shops, then that *thereafter* the defendant is only bound to use *ordinary care* to maintain such drawbars at the uniform and standard height mentioned in the testimony." Counsel for the other side contended in the case in 210 U. S. that "under the Safety Appliance Act it is immaterial whether the defendant had notice of the defect or had used ordinary care to prevent this and similar defects from arising," and that "the railroad is liable under the act, unconditionally, for any violation of its provisions"—citing *Carson* v. *Southern Railway*, 194 U. S. 136; *United States* v. *Atlantic Coast Line Railway Co.*, 153 Fed. Rep. 918; *United States* v. *Southern Ry.*, 135 Fed. Rep. 122; *United States* v. *Great Northern Ry. Co.*, 150 Fed. Rep. 229. It is thus seen that whether the act of Congress imposed an absolute duty upon the carrier in the matter of the required safety appliances, or whether knowledge or diligence on its part was an ingredient in the act condemned, was a question distinctly presented here by the assignments of error and by counsel on both sides. This court regarded the question as properly presented on the record, and that its duty was to meet and decide it. Speaking by Mr. Justice Moody, it said: "It is not, and cannot be, disputed that the questions raised by the errors assigned

were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that." What, then, was held by this court in the *Taylor Case?* Among other things, the court said: "On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow-servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry.* v. *Delk*, 158 Fed. Rep. 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, *not satisfied with the common law duty and its resulting liability*, has prescribed and defined the *duty by statute*. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just*. If the railroad does, in point of fact,

use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.* . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." These views were not new, but were in accord with previous judgments in several cases in the Federal courts. In *United States* v. *Phil. & R. Ry. Co.*, 160 Fed. Rep. 696, 698; *United States* v. *L. & N. R. R. Co.*, 162 Fed. Rep. 185–6; *United States* v. *Chicago, Great Western Ry. Co.*, 162 Fed. Rep. 775, 778.

It cannot then be doubted that this court in the *Taylor Case* considered the scope and effect of the Safety Appliance Act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and

ascertaining their condition from time to time. That the *Taylor Case*, as decided by this court, has been so interpreted and acted upon by the Federal courts generally, is entirely clear as appears from the cases cited in the margin.[1]

In *United States* v. *A., T. & S. F. Ry. Co.*, 163 Fed. Rep. 517, Mr. Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals, referred to the *Taylor Case* in this court saying: "It is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the nonliability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; . . . While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employé, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed

[1] *United States* v. *Phil. & R. Ry. Co.*, 162 Fed. Rep. 403; *United States* v. *Lehigh Valley R. Co.*, 162 Fed. Rep. 410; *United States* v. *Denver & R. G. R.*, 163 Fed. Rep. 519; *Chicago, M. & St. P. Ry. Co.* v. *United States*, 165 Fed. Rep. 423; *Donegan* v. *Baltimore & N. Y. Ry. Co.*, 165 Fed. Rep. 869; *United States* v. *Erie R. Co.*, 166 Fed. Rep. 352; *United States* v. *Wheeling & L. E. R. Co.*, 167 Fed. Rep. 198, 201; *Atlantic Coast Line R. Co.* v. *United States*, 168 Fed. Rep. 175, 184; *Chicago Junction Ry. Co.* v. *King*, 169 Fed. Rep. 372, 377; *United States* v. *Southern Pac. Co.*, 169 Fed. Rep. 407, 409; *Watson* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Wabash R. Co.* v. *United States*, 172 Fed. Rep. 864; *A., T. & S. F. Ry. Co.* v. *United States*, 172 Fed. Rep. 1021; *Norfolk & W. Ry. Co.* v. *United States*, 177 Fed. Rep. 623; *United States* v. *Illinois Cent. R. Co.*, 177 Fed. Rep. 801; *Johnson* v. *Great Northern Ry. Co.*, 178 Fed. Rep. 646; *Siegel* v. *N. Y. Cent. & H. R. R.*, 178 Fed. Rep. 873.

upon the railway company, § 5, relating to drawbars, is the same as § 2, relating to couplers, and § 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty."

In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving in interstate traffic, as open to further discussion here. If the court was wrong in the *Taylor Case* the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper. This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute changes the rule announced in the *Taylor Case*, this court will adhere to and apply that rule.

The *Taylor Case* was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury alleged to have been caused by the negligence of a corporation; whereas, the present action is to recover a penalty. This difference, it is suggested, will justify a reëxamination, upon principle, of the rule announced in the *Taylor Case*. In effect, the contention is that the present action for a penalty is a criminal prosecution, and

that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that "a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal." It was so decided, upon full consideration, in *Hepner* v. *United States*, 213 U. S. 103, 108. In that case it was also held that it was competent for the trial court, even though the action was for a penalty, to direct a verdict for the Government, the court saying that it was "fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law." So, in *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 337, 338; "The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion." If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. *Regina* v. *Woodrow*, 15 Meeson & Welsby, 403, 417; *People* v. *Snowberger*, 113 Michigan, 86; *Commonwealth* v. *Emmons*, 98 Massachusetts, 6, 8; *People* v. *Roby*, 52 Michigan, 577; *Edgar* v. *State*, 37 Arkansas, 219, 223; *Maryland* v. *Baltimore & Susquehanna Steam Co.*, 13 Maryland, 181,

187, 188. In *Halsted* v. *State*, 41 N. J. L. 552, 591, the suggestion was made that in determining the mind of the legislature, the dictates of natural justice should be the ground of decision, and not simply regarded as a mere circumstance of weight. But that court said: "As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention." So, in Greenleaf on Evidence: "Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril." (3 Greenleaf, 16th ed., §§ 21, 26 and notes.)

We need say nothing more. The case is plainly covered by the act of Congress. And as it is determined by the rule announced in the *Taylor Case*, it must be held that no error of law was committed to the prejudice of the defendant, and the judgment must be affirmed.

It is so ordered.